SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 789

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

Petitioner,

vs.

GORDON BROWNING ET AL., CONSTITUTING THE STATE BOARD OF EQUALIZATION OF TENNESSEE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE AND SUPPORTING BRIEF.

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Respondents.

PETITION FOR CERTIORARI AND SUPPORTING BRIEF.

Petitioner, The Nashville, Chattanooga & St. Louis Railway, respectfully prays the review on writ of certiorari of the decision and judgment of the Supreme Court of Tennessee, and the judgment of this Court thereon sustaining its several pleas as herein set out, to the end that the judgment of the Supreme Court of Tennessee may be reversed and that the petitioner's original petition for writs of certiorari and supersedeas, filed in the Circuit Court of Davidson County, Tennessee, may be finally sustained. A certified transcript of the record in the case is filed herewith.

Summary Statement.

The case was begun by petition filed in the Circuit Court of Davidson County, Tennessee, upon which were issued writs of certiorari and supersedeas to the State Board of Equalization of Tennessee, directing said Board to certify to the Court the record of the assessment of the properties of petitioner for *ad valorem* taxation for the years 1938-1939, and to make no certification of said assessment in a sum exceeding ten million dollars until the further orders of the Court (R. 1-26, 52-53).[1]

The filing of the original petition and the issuance of the writs "arrested the proceedings before the board of equalization, and removed the inquiry to the circuit court." *State ex rel. Vance v. Dixie Portland Cement Co.*, 151 Tenn. 53, 58.

Assessment of the property of railroad companies for taxation in Tennessee is made by the Railroad and Public Utilities Commission and the State Board of Equalization, the Board being charged by law with the duty of reviewing all evidence of value and of fixing the value of the property for assessment. Tennessee Code of 1932, Sections 1534-1535. (Quoted in dissenting opinion, Appendix, pp. 85-86.)

The evidence on which such assessments are made is required to be reduced to writing (Tennessee Code, Sec. 1523, Appendix, pp. 66-67) and all of the evidence considered in making the assessment under review was made a part of the record in this case. (See certificate of Commission and Board, R. 104-105.)

The Circuit Court ruled that no evidence could be offered in this proceeding other than the evidence certified by the Commission and Board; to which ruling there was no ex-

[1] The original tax return is filed here by order of the Chief Justice of Tennessee (R. 147, 501); all other references are to printed record.

ception, and no additional evidence was offered by either party (R. 80).

All the evidence on which the assessment was made was introduced by the Railway, and no substantial controversy of fact is presented by the evidence.

Testing the averments of the petition by the evidence certified to the court by the State Board of Equalization, the Circuit Court dismissed the petition and ordered the writ of supersedeas abated (R. 63, 78). On the appeal of the Railway, in the nature of a writ of error, the Supreme Court of Tennessee affirmed the judgment of the Circuit Court, two of the five justices of the court dissenting. The Chief Justice did not participate. Because of his illness, a member of the bar was specially appointed, who concurred with two regular members of the court to constitute the majority (R. 122, 134).

The supersedeas has, by proper order of a justice of the Supreme Court of Tennessee, been continued in effect until the disposition of this petition (R. 146).

Proper orders have been made, substituting as parties defendant the successors in office of original defendants (R. 58, 122).

The Railroad and Public Utilities Commission and the State Board of Equalization arrived at a value of petitioner's property for assessment by first fixing a value for petitioner's railroad system in the four States of Alabama, Georgia, Kentucky and Tennessee. From that value there was deducted the value ascribed to localized property, including railroad station terminal buildings and shops as well as real property not used in railroad operations, and the balance was found to represent the value of distributable property, road-bed, rolling stock and intangible property. The value so found for the distributable property was then allocated to the several States on the *sole basis* of the main track mileage in each State, notwithstanding the as-

sessors themselves valued different part of the Railway's line at widely varying figures. The aggregate value ascribed to the system was $23,996,604.14; to the Tennessee properties $16,223,194. The assessment is at the value so arrived at (R. 33-38, 100-102).[2]

Petitioner seeks a review of the judgment of the Supreme Court of Tennessee, on the ground that the judgment, and the assessment sustained thereby, operate to deny to petitioner due process of law and equal protection of the law, guaranteed by the Fourteenth Amendment to the Constitution of the United States, violate the commerce clause of Article 1, Section 8, of the Federal Constitution, and are not in accord with decisions of this Court interpreting and applying said provisions of the Constitution, in that:

(1) The assessment is made upon a valuation of petitioner's property arbitrarily arrived at by methods not likely or calculated to produce a fair or just result, in disregard of comprehensive evidence establishing a substantially smaller value for the property valued and assessed. The amount of that part of the assessment in controversy is in excess of $6,000,000. *Great Northern Ry.* v. *Weeks*, 297 U. S. 135; *Southern Ry. Co.* v. *Kentucky*, 274 U. S. 76, 81-82.

(2) The petitioner's railroad is a complex system, operated in four States, with unprofitable branch lines (75 per cent in Tennessee) composing 38 per cent of its road mileage. There is no uniformity of value among the several branches and divisions, valued by the assessors variously at from $3,300 to $37,200 per mile. The value per mile in Tennessee is shown by uncontradicted evidence to be less than the system average. System value allocated to Tennessee on the sole basis of road mileage adds to the Tennessee as-

[2] References herein are to the assessment, Exhibit No. 2 to the original petition for certiorari, "in words and figures" as certified by the Railroad and Public Utilities Commission (R. 89).

sessment values existing, if at all, only in other States and not subject to taxation in Tennessee. *Fargo* v. *Hart*, 193 U. S. 490, 500; *Rowley* v. *Chicago & N. W. Ry.*, 293 U. S. 102, 109-110.

(3) The Constitution of Tennessee requires that all property be assessed for taxation at actual value, in order to secure equality, with no species of property taxed higher than other property of the same value. Pursuant to a systematic plan and method practiced for more than forty years by local assessors in Tennessee, the general mass of property was intentionally and wilfully assessed for taxation in 1938 at an arbitrary percentage adopted by the several assessors, averaging not more than two-thirds of actual value, the rate of assessment in no county or city of the State exceeding three-fourths of actual value; while the property of petitioner is assessed for the same taxes for the same year at 100 per cent of its actual value as found by the assessors, (and in fact at substantially more than actual value), in direct violation of the constitutional principle of equality. *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 516-518; *Sioux City Bridge* v. *Dakota County*, 260 U. S. 441, 445-447.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under the Act of Congress of February 13, 1925, Chapter 229, 43 Statutes at Large, 936, amending and reenacting Section 237 (b) of the Judicial Code.

The judgment sought to be reviewed was rendered by the Supreme Court of Tennessee, the highest Court of the State in which a decision in the suit could be had, on December 16, 1939 (R. 122), the effective date of the decision having been postponed until the disposition of petitioner's petition for rehearing which was denied on January 20, 1940 (R. 143). The opinions of the State Court are not reported.

This application for the writ of certiorari will be filed on or before March 5, 1940, in compliance with the condition upon which the assessment is stayed by order of a Justice of the State Court, pending disposition of this proceeding (R. 146).

The nature of the case is set out in the summary statement hereinabove, presenting the complaint of the petitioner that, except it be granted relief in this proceeding, its property in Tennessee will be subjected to a grossly excessive and arbitrary assessment for *ad valorem* taxation by the State of Tennessee, and its counties and cities, which assessment was made by arbitrary and illegal methods, denying to petitioner the equality in taxation required by the Constitution of Tennessee, depriving petitioner of rights and immunities guaranteed to it by the "equal protection of the law" and "due process of law" clauses of the Fourteenth Amendment to the Constitution of the United States; and subjecting its operations in interstate commerce to discriminatory and unreasonable burdens, in violation of Article 1, Section 8, of the Constitution of the United States.

The Federal questions involved are substantial. The part of the assessment in controversy exceeds $6,000,000. The average county tax rate in Tennessee is $2.22 per $100.00, and the State tax rate is $.08 per $100.00. (Affidavit McKeand, R. 301) Municipal taxes are in addition. Taxes on the disputed part for the biennium will amount to more than $300,000.00.

Arbitrary and unreasonable methods employed by the assessors to arrive at a grossly excessive valuation of petitioner's property for assessment, and the ruling of the State Court thereon, are set out herein at pages 10-19. The constitutional rights and immunities here invoked were pleaded in the original and amended petition, by which the suit was begun in the trial court (Circuit Court of Davidson County)

(R. 9-15, 57-58). They were presented to the State Supreme Court by petitioner's first, second and third assignments of error (R. 107-108).

That the allocation of system value to Tennessee on the sole basis of road mileage, in spite of uncontradicted proof of a total lack of uniformity in the various parts of the system and of the smaller value of the part of Tennessee than that outside the State, is contrary to the Constitution and the decisions of this Court, is shown herein at pages 19-23. The constitutional rights invoked were pleaded in the original and amended petition (R. 15-17, 56-57); repeated in petitioner's fourth and fifth assignments of error in the State Supreme Court (R. 109-110).

The record shows that for more than forty years the Legislature and Courts of Tennessee have refused or failed to effectively secure to Tennessee taxpayers the constitutional guarantee of equality in assessment for taxation. Discrimination against railroads and utilities is magnified by the dual assessment system; the property of individuals, holding the voting power, being assessed by local assessors, and the property of railroads and public utility corporations being assessed by a central commission and board.

The history of the ineffectual effort to attain uniformity appears from the affidavits of W. H. Swiggart, and the exhibits thereto (R. 323-333). The practice of underassessment has been judicially noticed by the Supreme Court of Tennessee. *Wray* v. *Railroad Co.*, 113 Tenn. 544, 560. It was the basis of judicial relief in *Taylor* v. *Louisville & N. R. Co.*, 88 F. 350, and in *Trustees, Cincinnati Sou. Ry.* v. *Guenther*, 19 F. 395.

Surveys made by impartial agencies, not connected with this litigation, establish without controversy the continuance of the system of underassessment by local assessors to the present time. (First and second affidavits of W. R. Pouder, and exhibits, R. 333, 348.) Local assessors of

twenty-five of the thirty-one counties in which petitioner's property is taxed admit adherence to the system (R. 347-446). There is no evidence to the contrary. Since 1920, when there was a general revaluation of property for assessment, the aggregate assessment of property assessed locally has decreased 28 per cent; that assessed by the Railroad and Public Utilities Commission only 7 per cent; *while the assessment of petitioner's property is increased 5 per cent over 1920.* The decrease in the aggregate assessment of farm lands and implements since 1920, assessed locally, is 49 per cent (R. 336-337).

The Railroad and Public Utilities Commission makes no effort to equalize its assessments with assessments made by county assessors. (See statement of former chairman, R. 325-326.) The State Board of Equalization dismissed petitioner's claim with a casual observation that the witnesses had not sufficiently stated the basis of their testimony showing intentional undervaluation of property for assessment. Authorized by statute to make full investigation the Board made none (R. 100-102).

The Circuit Court (trial court) ruled that it was not its duty to determine what weight should be given to the undisputed proof of underassessment, on the theory that only an error of judgment was involved, and declined to follow the rule in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441 (R. 86-87).

The Supreme Court of Tennessee declined to sustain the petitioner's claim to equalization, indulging a technical presumption that the State Board of Equalization had not participated in the underassessment of other property, and ruling that it was essential to petitioner's case that the State Board had participated in an intention or fraudulent purpose to disregard the fundamental principle of uniformity (R. 131-132; Appendix, p. 80.)

This ruling interposed a non-substantial and immaterial presumption to defeat uncontradicted proof of inequality and discrimination in assessment. Action by the State Board was not essential to the finality of the ratio-assessments made by the local assessors, except on "specific" complaint sworn to by a taxpayer that other property had been underassessed, or assessed "at a less percentage of value than his own property." Code of Tennessee, sections 1433, 1450; Appendix, pp. 65, 66. The Railway's assessment was not made until a year after the completion of the local assessments, and since each local assessor applied the same percentage of value throughout his jurisdiction, no taxpayer so assessed had motive or incentive to invoke action by the State Board increasing his own and other assessments. There is no evidence that any such complaint was made.

The State Board is prohibited by law from increasing "a single assessment" without specific notice to the property owner affected, affording him a hearing, with the right to introduce evidence. Code of Tennessee, section 1453; Appendix, p. 66.

The ruling of the Supreme Court of Tennessee is in direct conflict with the decision of this Court in *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 518, and in *Sioux City Bridge* v. *Dakota County*, 260 U. S. 441, 446.

At every step of this proceeding petitioner has been denied a consideration of the merits of its claim to fair valuation and equalization, through the indulgence of technical rules of procedure or presumption. Action by this Court, under the Fourteenth Amendment to the Constitution of the United States, is necessary to the preservation of petitioner's constitutional rights in this and future assessments, and of those like situated in Tennessee.

The record demonstrates that the methods employed by the Tennessee assessors for ascertaining the value of rail-

road properties for assessment lag far behind those established by modern study and usage, as reflected in the cited opinions of this Court, and are neither scientific nor just. The importance of a present factual consideration of value, both to the railroads and to the State, is clearly stated in the dissenting opinion of Mr. Justice Chambliss herein, appendix, pp. 89-91. The dual system of assessment, with the statutory prohibition of increase by the State Board of Equalization of assessments made locally, except on specific and sworn complaint of a taxpayer, with notice to each owner of underassessed property and right of hearing, will perpetuate the proven inequality in the assessment and taxation of railroads and utilities in Tennessee, unless relief is accorded petitioner in this case.

The failure of the State's representatives to produce any evidence to refute the proven discrimination in assessment is an implied admission of the inequality denounced by the Federal Constitution, which the State in this proceeding seeks to perpetuate. Such disregard of the constitutional principle of equality in taxation justifies and requires the condemnation of the assessment herein by the judgment of this Court.

The Federal questions arising from the arbitrary discrimination in assessment were presented in the original petition by which the assessment proceeding was removed to the Circuit Court of Davidson County, Tennessee, and were repeated in the seventh and eighth assignments of error filed in the Supreme Court of the State. (Original Petition, R. 18-20; Assignments of Error, R. 111-113.)

The Assessment was Arbitrarily Made and is Grossly Excessive.

The original petition averred that the value ascribed by the assessors to petitioner's system property was "an arbitrary value which is not supported by nor sustained by any

evidence submitted to or properly considered by said Commission" (R. 10-11). The petition avers that the valuation so made is nearly fifty per cent in excess of the value shown by a reasonable capitalization of the earnings of the property, averaged over a period of five years, without support in evidence for such excess; and shows that the assessors had so manipulated the assessment of two years before as to arrive at a present value per mile of the railroad in Tennessee which produced an identical assessment in Tennessee for a reduced mileage which had been made on a greater mileage two years before (R. 13). An amendment to the petition avers that this manipulation of a former assessment was made the basis of the present assessment, without consideration of the evidence filed with the Commission (R. 58). The petition and amendment aver that the assessment so made denies to petitioner its rights under the "due process of law" and "equal protection of the law" clauses of the Fourteenth Amendment to the Constitution of the United States (R. 15, 58).

1. The 1936 assessment appears at R. 322; the present (1938) assessment at R. 37. The arbitrary method by which the Commission reached an identical assessment of distributable property for the four years, 1936-1939, is shown by the following table:

1936 Assessment	
838.98 miles at $15,407.929 per mile	$12,926,944
1938 Assessment	
800.02 miles at $16,158.276 per mile	$12,926,944

To produce this identity of assessment, after an interval of two years, involving the use of tenths of a cent in the valuation of a mile of railroad, the assessors increased their earlier valuation by $750.247 per mile, exactly offsetting the abandonment of 38.96 miles of main line included in the

1936 valuation. This result could have been achieved only by a backward process, designed to reach a predetermined assessment figure.

The dissenting opinion of Mr. Justice Chambliss views this evidence as demonstrating that the previous assessment was "not only considered, but adopted,"[3] notwithstanding the proof "calls for at present a thoroughgoing investigation of basic elements of value applicable to present day conditions" etc.[3] (R. 141, 142; Appendix, pp. 91, 92).

The majority opinion of the State Supreme Court misconceived the position of petitioner, and failed to note the identity of result, because there was a reduction in the *total* assessment from 1936. The Court failed to note that this reduction was wholly in the valuation of localized property, valued separately from the distributable property. Opinion, R. 133; App., pp. 81-82.

A similar identity of assessment over a period of three years was held to constitute evidence of intentional overvaluation for assessment by the United States Circuit Court of Appeals for the Eighth Circuit (1939) in *Bailey* v. *Megan*, 102 F. (2d) 651 (Headnote 12, page 657), citing *Great Northern Ry.* v. *Weeks*, 297 U. S. 135, 151, as authority for a judgment enjoining the enforcement of the excessive amount. Petitioner relies here on these cases.

2. Evidence was filed with the assessors, contained in the printed record in this Court, showing the financial history and structure of petitioner, its operating results for many years, the disastrous effect on former values of a revolution in transportation, etc., resulting in an accumu-

[3] Mr. Justice McKinney, dissenting, said:

"The State Board of Equalization, furthermore, seems to have been largely influenced by the 1936-1937 assessment of the Railway property, which, it states, the record shows was agreed to by the Railway. Such statement is not supported by the record; but if it was that would be no criterion of value, since the statute expressly provides the method by which such value is to be ascertained." (Appendix, p. 87.)

lated deficit for the seven-year period, 1931-1937, of $2,708,959.00.

The response of the Railroad and Public Utilities Commission to this comprehensive evidence is copied in full in the margin.[4] Its reference to the petitioner's ownership of a substantial amount of cash and "non-taxable Federal notes and bonds" constitutes arbitrary action, indicating an assessment rested on ability to pay rather than on value subject to assessment. And the statement that petitioner's revenues "were increasing since the tentative assessment was made" is without support and untrue.

This reliance on the ownership of "non-taxable" securities ($2,081,774) as a basis for the assessment, was urged upon the State Board of Equalization by the Commission's "rate expert," Mr. Hendley, in presenting the case to the Board for the Commission (R. 99-106).

While the Commission indicated in the tentative assessment, made in August, 1938, that it had made "due allowance" for non-taxable securities, its response to petitioner's exceptions and proof, filed in October, (R. 92), demonstrates a change of position.

The Commission, through Mr. Hendley gave further evidence of the arbitrary process by which it made its valuation, by arguing that value must rest upon "gross receipts" and not upon net income.[5] Gross receipts alone are not

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[4] "Written exceptions to the tentative assessment were filed; new evidence, affidavits and exhibits were also filed and argument heard. Evidence indicated the corporation's net railway revenues were increasing since the tentative assessment was made and that its present financial condition was good, that is, it had on hand $3,569,801 in cash and non-taxable Federal bonds and notes. After carefully considering all evidence and other matters submitted, we are of the opinion and find that exceptions should be, and they are, hereby denied" (R. 92).

[5] Mr. Hendley said:

"Not once in the law do we find the word 'net.' The law sets out plainly what shall be considered and those elements principally are the gross

evidence of value. In 1916 petitioner's gross operating revenues were nearer in amount to the revenues for 1937 than in any other year. Approximately the same revenues produced in 1916 a net income of three million dollars; in 1937 a deficit of $471,623. Exhibit No. 2 to testimony L. E. McKeand (R. 306-A).

3. The assessment values the petitioner's localized property in Tennessee in the brief sentence: "We find the value of such localized property in Tennessee as returned by the corporation to be $3,297,250" (R. 37).

This property consists of several thousand items, each of which is separately valued by petitioner in its tax return, the aggregate being $2,387,395. See original tax return filed with printed record, page A, and items at pages 25-97. *There is no other evidence of the value of these many items*, and the addition by the assessors of $909,855 to the aggregate, with no supporting evidence *and without even indicating which items were increased*, is cited as direct evidence of arbitrary and capricious overassessment (Assessment, R. 37).

The Commission certifies that all evidence considered in making the assessment is made a part of the court record (R. 104-105).

The value arbitrarily ascribed to the Tennessee localized property, $3,297,250, was by the Commission added to the value it had ascribed to the distributable property by the backward process hereinabove demonstrated, and to that total was added the value of localized property outside Tennessee as reported by the petitioner, the aggregate making up the $23,996,604.14 reported as the system value. See assessment (R. 37).

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receipts, the value of the stocks and bonds and the value of the corporate property" (R. 98).

This position is aptly criticised by Mr. Justice Chambliss, Appendix, p. 91.

The State Supreme Court passed this evidence of arbitrary valuation with the ruling, on petition to rehear: "This attack on the assessment was not *specifically* made by any of the assignments of error filed in this court," and again: "The railway did not *specifically* assign as error the action of the Commission and Board in assessing its localized property at $3,297,250." (Italics added.) (R. 143-144; Appendix, pp. 93-94.)

Petitioner has not asked, and does not now ask, that the assessment of localized property be separately adjudged null and void. In its original brief in the State Supreme Court, as here, it urged the obvious arbitrariness of the unsupported addition to the values shown by the return, as *evidence* supporting the second and third assignments of error in the State court (R. 107-8) that the valuation made of the railroad system, as a basis for the assessment, is without support in the evidence and is unreasonably excessive and confiscatory, etc.

4. That the valuation placed by the assessors on petitioner's railroad system is grossly in excess of the value reasonably deducible from the evidence is shown clearly on the record. The evidence of value is set out and discussed in the supporting brief, at pp. 42-49. Capitalization of the average net operating revenues over a period of seven years, with net income from non-operating property added, indicates a system value of only $16,021,298, one-third less than the value found by the assessors.[6] Exhibit No. 4 to testimony L. E. McKeand (R. 308); Ev. McKeand (R. 297-298).

5. The State Board of Equalization was required by law to review the evidence and finally fix the value of peti-

[6] Combination of the stock and bond test and capitalization of income test, as in *Great Northern Ry.* v. *Weeks*, 297 U. S. 135, 147-149, shows a maximum system value of $18,815,494 (Brief 45).

tioner's property for assessment. The applicable statutes are copied in the dissenting opinion of Mr. Justice McKinney (R. 135-137; Appendix, pp. 84-86).

The majority opinion of the State court does not differ with the view expressed in the dissenting opinions, that it was the statutory duty of the Board of Equalization to review the evidence and fix the value of the property for assessment. On the rehearing the court said: "This court did not hold that the examination by the Board of the assessment was dependent upon the railway's appeal or limited or restricted thereby" (R. 144; Appendix, p. 94.)

The opinion of the State Board of Equalization is copied in the appendix hereto, at pp. 68-70. It made no finding with respect to the value of the property, except to note a reduction in assessment since 1929 "comparable with the reduction enjoyed by owners of other property, or any class of property," and "assumed" that the valuation made by the Railroad and Public Utilities Commission was made on a consideration of the evidence. That the Board totally abrogated its statutory duty is demonstrated by the dissenting opinions, to which reference is here made (R. 135, 138; Appendix, pp. 84, 88).

"The extraordinary shrinkage in values of railroad properties," referred to by this Court in *Great Northern Ry. v. Weeks*, 297 U. S. 135, 151, and shown by the proof herein, was ignored by the Board.

The State Board of Equalization is composed of the Governor of Tennessee, the Secretary of State, the State Treasurer, the Commissioner of Finance and Taxation and the Commissioner of Adminstration, acting "ex officio". Code of Tennessee, sec. 1447; Public Acts of Tennessee, 1937, chapter 33. The Commissioner of Finance and Taxation and the Governor did not sit in this case. Appendix, p. 70.

6. The assessment purports to rest on the financial structure and operating results of the property. (R. 33-38.) It in fact rests upon a valuation arrived at by arbitrary methods not likely to produce a fair result and which is "in excess of the amount upon which it can honestly be believed the property is capable of earning an acceptable return." It therefore cannot be sustained. *Bailey* v. *Megan*, 102 F. (2d) 651, 655, citing *Great Northern Ry.* v. *Weeks*, 297 U. S. 151.

7. Section XII of the original petition charged that the overassessment of petitioner's railroad property, employed as an agency of interstate commerce, will result in the exaction from the property of unjust and illegal taxes, and to that extent impair petitioner's ability to properly function as a common carrier in interstate commerce. It was there charged that the assessment constitutes an unreasonable, arbitrary and direct burden upon interstate commerce, in violation of Article 1, section 8, of the Constitution of the United States (R. 21-22).

8. These several contentions, and prayers for relief under the cited sections of the Constitution of the United States, were repeated in the first, second and third assignments of error made by petitioner in the Supreme Court of Tennessee, and specific reference to said assignments of error is here made. (R. 107-108).

9. The Supreme Court of Tennessee denied petitioner's asserted constitutional rights and immunities on the ground that, by judicial rule in Tennessee, the valuation for assessment by the State Board of Equalization is not subject to review by the courts "where the Board has not with reference to the assessment, exceeded its jurisdiction or acted illegally or fraudulently," but added: "Where, however, the Board acts illegally, fraudulently or in excess of its jurisdiction, certiorari is the proper remedy." (R. 125, Ap-

pendix, p. 73.) In denying rehearing the Supreme Court said:

> "The Board had jurisdiction. It did not act illegally. The railway makes no claim of fraud as against the Commission or the Board. The valuation placed on the properties of the railway for taxation by the Board cannot be reviewed by the courts, in the absence of fraud. See authorities cited in opinion." (R. 145, Appendix, p. 95.)

The State Supreme Court correctly held that the statutes of Tennessee do not require that net income be made a predominant factor in arriving at the value of railroad property for assessment, but wrongfully declined to review the evidence to determine the truth of petitioner's averment that this record contains no evidence upon which a conclusion of value can be properly reached, save by consideration of its income-producing capacity. The court discussed general rules of law but declined to consider the evidence on which the particular assessment must find support.

Petitioner invokes the rule stated in *Great Northern Railway* v. *Weeks*, 297 U. S. 135, 151:

> "In cases such as this, courts are not permitted to weigh evidence of value. They may not substitute their opinions for the findings of assessing officers or boards. But, when the jurisdiction of the district court is appropriately invoked, it is its duty to decide upon the merits of the taxpayer's claim that the assessment of his property was arbitrarily made and is grossly excessive. * * *"

The original petition having charged that the assessment was arbitrarily made and was grossly in excess of the value shown by the evidence, all of which was before the court, and it having been charged that enforcement of such assessment would violate the constitutional rights and inhibitions cited, petitioner was entitled to the decision of the State

court on the merits of its claim. Such decision having been denied on the erroneous theory that violation of the constitutional rights invoked does not amount to illegality, petitioner is entitled to certiorari from this Court, and to a judgment sustaining its claim or remanding the case to the Supreme Court of Tennessee for decision of the merits of the rights asserted by petitioner.

Allocation of System Value to Tennessee.

The assessment of petitioner's distributable property in Tennessee is made by allocation of system value to the state on the sole basis of ratio of road mileage in Tennessee to road mileage of the system. (Assessment, R. 37.)

Section VIII of the original petition avers that this method of allocation, assigning to Tennessee 71.73 per cent of the system value, is unreasonable, arbitrary and confiscatory, in that values existing only in other states are by this means imported into Tennessee and are given a situs for taxation, contrary to the "due process of law" clause of the Fourteenth Amendment to the Constitution of the United States (R. 15-17).

The petition avers that the value of the distributable property per mile in Tennessee is substantially less than the per mile value of the system outside Tennessee. It is averred that branch line mileage constituting 38 per cent of the system, handles only 4.4 per cent of the gross tonnage and only 1.2 per cent of the passenger traffic of the system, and that 75 per cent of this branch mileage is in Tennessee; that only 64.11 per cent of the system value found by the Interstate Commerce Commission, brought down to date, is assigned by the Commission to Tennessee; that the net railway operating income per mile of main track in Tennessee is only 41.84 per cent of the per mile income outside Tennessee. The petition avers that the value of petitioner's distributable property in Tennessee, subject to taxation in that State,

is not in excess of 64.11 per cent of the value of the system property (R. 15-16). Failure of the Commission to find uniformity in value as a basis for the allocation is expressly averred in an amendment to the original petition (R. 56-57).

Abundant proof, uncontroverted, is in the record, sustaining the averments of the petition (Brief, 49-52). The difference in assessment between the 71-73 per cent of system value assigned to Tennessee by the assessors, and the 64.11 per cent averred in the petition as the proper measure of value, increases the assessment by an amount in excess of $1,000,000.

The constitutional rights and immunities so asserted by the petition were presented to the Supreme Court of the State by the fourth and fifth assignments of error (R. 109-110).

The assessment itself negatives any finding of uniformity in the value of the distributable property of petitioner's railroad system. An early Tennessee decision (1883) requires the Commission to separately find the value for assessment of each branch or division of a complex railroad system. *Louisville & N. R. Co.* v. *Bate*, 80 Tenn. 573, 579-580. In complying with this rule of the Tennessee courts the Commission expressly found values per mile ranging from $3,300 for four of the branch lines to $37,200 for the Chattanooga and Atlanta Divisions (R. 38). Less than one-half of the Tennessee mileage is valued by the assessors at a sum per mile as great as the average found for the system. The mileage of each division, including the mileage outside Tennessee, is stated on page 10 of the original tax return, filed with the printed record. If the value per mile for each division stated in the assessment is applied to the entire division, the aggregate result is a system value for distributable property nearly $2,000,000 in excess of the aggregate found for the system by the

Commission itself; a result which clearly impeaches the method of allocation applied.

The assessors were required by rule of the Supreme Court of Tennessee (*Louisville & N. R. Co.* v. *Bate*, 80 Tenn. 573) to separately value the several divisions and branches of the railroad within the State, for allocation of distributable value among the taxing districts. In the case cited the complex nature and varying value of petitioner's system were noted as demonstrating the necessity for the rule.

Finding disparity of value in the several parts of the system, in complying with the Tennessee rule, the assessors did not make the inconsistent finding of uniformity of value per mile of track in the several states, but without attempt at justification made the allocation on the sole basis of road mileage. See amended petition for certiorari (R. 57). This arbitrary action of the assessors produced the anomalous ruling of the State court sustaining inconsistent methods of allocating the same values among taxing jurisdictions in the same assessment.

The assessors classify 39.7 of the road mileage in Tennessee as "branch lines," and assign to that mileage only 13 per cent of the value allocated to the State. The remaining 87 per cent of value allocated to Tennessee is assigned to 60.3 per cent of the main track (Assessment, R. 38). The assessors conclusively rejected the theory of uniformity in value of the several parts of the system.

The Supreme Court of the State cited only the early cases of *Pittsburgh, C., C. & St. L. Ry.* v. *Backus*, 154 U. S. 421, and *Cleveland, C., C. & St. L. Ry. Co.* v. *Backus*, 154 U. S. 439, as sustaining "the well established rule for assessment on a mileage basis." The Court said:

> "Furthermore, the exception to the rule contemplates, we think, that it be clearly shown that the por-

tion of the road out of the State has a greater value than the part within the State, such as terminal facilities or other improvements not found within the State" (R. 130; Appendix, p. 78).

The Court further ruled that the record "does not disclose that the portions of the railroad outside Tennessee are largely of greater value than the portion within the State, or that any special circumstances exist to show a greater value outside the State than within the State" (R. 130; Appendix, p. 78).

There being no controversy in the evidence, the ruling of the Supreme Court is a conclusion of law that a substantial difference in cost, in use, and in operating income, in favor of that portion of the Railway outside the State, does not establish a greater value for that portion of the road than for the porfion within the State. The uncontroverted evidence shows that by every test of value, appropriate to the valuation of railroad property, a great disparity exists between the value of the property in Tennessee and the value outside the State, and the assessment itself shows that the allocation was made notwithstanding the expressed conclusion of the assessors that the system, including 38 per cent branch line mileage, is not of uniform value, two of the divisions being valued at a per mile value more than ten times that ascribed to four of the branches. Reference is made to the table of ratios on page 51 of the supporting brief, demonstrating the disparity between the value of the Tennessee Mileage and that outside the State.

The decision of the Supreme Court of Tennessee on this branch of the case is a denial of the constitutional rights and immunities asserted by the petitioner, notwithstanding uncontroverted evidence sustaining the claim of constitutional violation. Petitioner is entitled to the writ of certiorari and to the judgment of this Court, that the alloca-

tion of system distributable property to Tennessee for assessment operates to deprive the petitioner of "due process of law" because made by a method which does not "fairly reflect the relation between value of the system as a whole and value of the part within a State," subjecting property values to taxation in Tennessee which exist only in other States.

Great Northern Ry. v. *Weeks*, 297 U. S. 135, 144;
Rowley v. *Chicago & N. W. Ry.*, 293 U. S. 102, 109-110;
Wallace v. *Hines*, 253 U. S. 66;
Union Tank Line v. *Wright*, 249 U. S. 275;
Fargo v. *Hart*, 193 U. S. 490, 500;
Pittsburgh etc. Ry. v. *Backus*, 154 U. S. 421;
Southern Ry. Co. v. *Kentucky*, 274 U. S. 76.

Petitioner was Denied Equalization.

The Constitution of Tennessee does not permit classification of property for purposes of *ad valorem* taxation, but directs that all property shall be taxed according to its value, so that taxes shall be equal and uniform throughout the State. It is further provided in the State Constitution: "No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value."

Constitution of Tennessee, Article 2, Sections 28-29.
Quoted, Brief, pp. 52-53.

The Supreme Court of Tennessee has ruled that the sole and manifest purpose of the constitutional provision for the taxation of property according to its value "was to secure uniformity and equality of burden" etc. *Treadwell Realty Co.* v. *Memphis*, 173 Tenn. 168, 174; 116 S. W. 2d 997.

The remedy provided by law in Tennessee for the correction of inequality in assessments, which it is the pri-

mary duty of the Board of Equalization to equalize, as its name imports "is by certiorari in a court of law." *King* v. *Bristol*, 156 Tenn. 643, 4 S. W. 2d 343; *Briscoe* v. *McMillan*, 117 Tenn. 115, 133-134, 100 S. W. 111.

The original petition for certiorari to the State Board of Equalization, in section X, avers that all property, except that of railroads and public utilities, is assessed for taxation by county and municipal tax assessors; that the property of the petitioner is located in thirty-one counties, in which it is respectively subject to taxation at the same rate as property assessed by county and municipal assessors, and for the same purposes; that by statute of general application the State levies a tax on all property of eight cents on the $100.00 of value, and that the average rate of taxation of the several counties is $2.22 per $100.00 of taxable value, to which municipal taxes are added; that taxes for the year 1938 on property generally, other than that assessed by the Railroad and Public Utilities Commission, are levied on assessments made by local assessors in 1937; that for more than forty years, up to and including the 1937-1938 assessments, the several county and municipal tax assessors in Tennessee have voluntarily, intentionally, wilfully and systematically assessed property within their several jurisdictions at less than actual cash value, pursuant to which established custom and intentional scheme of assessment property in no county of the State is assessed at more than 75 per cent of actual cash value, and the average of all assessments made by the several county and municipal tax assessors, as the basis for taxation for 1938, is not in excess of 66⅔ per cent of actual cash value; that the valuation and assessment of petitioner's property was made by the Railroad and Public Utilities Commission and State Board of Equalization on the basis of 100 per cent of the taxable value of such property, and

is in fact greater than the actual or 100 per cent value of the property (R. 18-20).

The original petition for certiorari further avers that the application of the several tax levies to the assessment of petitioner's property will require and exact of petitioner a substantially greater tax than is required and exacted of the property of other taxpayers, with the same result as if the property of petitioner were taxed at a rate one-third higher than the rate applied to the property of other taxpayers; all of which is charged to amount to a denial to the petitioner of the rights, privileges and immunities guaranteed and preserved to it by the Constitution of Tennessee, Article 2, section 28, and by the "due process of law" and "equal protection of the law" clauses of the Fourteenth Amendment to the Constitution of the United States (R. 20; Amendment to Petition, R. 58).

The petitioner's claim that the inequality in assessment set out in the petition was a denial to it of "due process of law" and "equal protection of law," guaranteed by the Fourteenth Amendment to the Constitution of the United States, was duly and properly presented to the Supreme Court of Tennessee by petitioner's assignments of error Nos. seven and eight, to which reference is here made (R. 111-113).

The averments of the petition for certiorari were supported by uncontroverted proof of the existence of a long-continued and well-established practice and custom of underassessment by local tax assessors throughout the State of Tennessee, followed in the assessment of property in the year 1937, upon the basis of which 1938 taxes are levied, as set out in the petition. The evidence includes the results of an impartial survey and investigation in every county and municipality of the State by the Tennessee Taxpayers Association, made prior to the institution of this suit, for presentation to the Legislature of Tennessee in

the public interest, and not on behalf of the petitioner. Testimony of officers of the Association who conducted the survey sustains the averment of the petition that in no county or municipality of the State is property assessed by the local assessors at more than 75 per cent of actual value, and that the average is about two-thirds of actual value (R. 333-343, 448).

The proof includes a report by the State Comptroller of the Treasury in 1894 showing the establishment of the custom of underassessment at that date, and a report of a Commission appointed by the Governor in 1915, demonstrating the uninterrupted continuance of the practice of underassessment (R. 324-325).

In addition to this general evidence testimony of the local tax assessor or members of the county board of equalization in twenty-five of the thirty-one counties in which petitioner's property is located affirms the intentional and systematic observance of said custom and practice of underassessment, and establishes the fact of such underassessment of property generally for the year 1938 (R. 347-446). Eighteen of the thirty-one county tax assessors so testified, and members of the county board of equalization from nineteen of the thirty-one counties so testified. This evidence is set out more particularly at pages 60-63 of the supporting brief, with references to the pages of the record where it is to be found. Testimony of other county officers and citizens possessing knowledge of the facts was also offered from each of twenty-seven counties.

No evidence was offered to the contrary. The record shows that the evidence of the petitioner was filed with the Railroad and Public Utilities Commission nearly sixty days prior to the review of the assessment by the State Board of Equalization, and the evidence was permitted to stand without contradiction or effort at impeachment.

The response made by the State Board of Equalization to petitioner's claim that it was entitled to have its assessment reduced by one-third, in order to secure equality in taxation with other taxpayers was casual and laconic. After observing that the members of the Board served *ex officio* and had not adequate time "to give the necessary investigation to entirely satisfy even ourselves that we may reach an equitable conclusion," the Board referred to the affidavit of the Executive Secretary of the Tennessee Taxpayers Association and said: "This information is very interesting but we are not familiar with the method used by him in reaching his figures on actual cash value, nor do we know how the percentage of cash value was reached for assessable purposes. Many other affidavits are in the record purporting to establish that theory, but we think they are subject to the same objection as that of Mr. Ponder" (R. 102; Appendix, p. 70.)

There was no further discussion of the evidence by the State Board of Equalization. It did not refer to the fact that the assessors who themselves had made the assessments of other property had testified that they had voluntarily, intentionally and systematically returned property for assessment at values representing a ratio of actual value, in no case in excess of 75 per cent of actual value.

The Board concluded: "For the foregoing reasons, we are satisfied that the assessment of companies [*sic*] property is just and fair to it, *and in line with all other like property within the state.*" (Italics added.) (Appendix, p. 70.) The use of the qualifying adjective "like" is a clear admission by the Board that it did not intend to find the assessment in line with assessment of property other than railroads. This qualification by the Board was not noted by the Supreme Court of the State.

The Supreme Court of Tennessee, responding to the petitioner's asserted right to equalization referred to the

statutory oath of county assessors and boards of equalization to make and equalize assessments at actual cash value. It did not review the evidence, nor indicate an opinion that the proof was not sufficient to establish the underassessment of the general mass of property in the State. Its ruling was as follows:

> "If the county assessors and the few members of county boards of equalizers making affidavits on the hearing before the Commission assessed property at less than actual value, and did so intentionally and systematically there is no showing whatever that the members of the State Board of Equalization violated their oath of office by underassessing property. In the absence of a contrary showing, it must be assumed that the State Board did their duty. There is neither allegation nor proof that the State Board intentionally and systematically refused to equalize assessments at actual value. The good faith of such officers and the validity of their actions are presumed. Sunday Lake Iron Co. *v.* Wakefield, 247 U. S. 350, 62 L. Ed. 1154. In order to support a claim of discrimination under the equal protection clause of the Fourteenth Amendment there must be something that amounts to an intention or the equivalent of fraudulent purpose to disregard the fundamental principle of uniformity" (R. 131-132; Appendix, p. 80).

The court's reference to "the few members of county boards of equalizers" indicates its failure and refusal to consider the evidence submitted to it. Members of the county board of equalization from nineteen of the thirty-one counties in which petitioner's property is located made affidavit that they had consistently and intentionally followed the practice of equalizing assessments in their respective counties on the basis of a percentage, in no case exceeding 75 per cent, of the actual value. Evidence reviewed at Brief, pp. 60-63.

This Court has ruled that the statutory oath of tax assessors is not only no bar to the competency and weight of their testimony that they had followed a custom and practice of underassessment, but that, in a like case "They were called because they were men of long experience in assessing property in the county and state, to testify to the existence of systematic and intentional undervaluation of the property of others—of property generally."

Bohler v. *Calloway*, 267 U. S. 479, 491.

The State Supreme Court apparently conceived it to be necessary, to sustain the petitioner's claim, that the State Board of Equalization, having refused to recognize petitioner's claim, had participated in the systematic and intentional underassessment of other property; and the assignments of error were apparently overruled on the basis of the statement in the opinion "There is neither allegation nor proof that the State Board intentionally and systematically refused to equalize assessments at actual value" (Appendix, p. 80).

Such allegation and proof would have been inapt, and were wholly unnecessary. Assessments made by local assessors are by statute made "final," except in so far as they "may be" revised or changed by the State Board. (Code of Tennessee, section 1433; Appendix, p. 65.) Such revision or change by the State Board is conditioned upon the filing of a specific, sworn complaint by a taxpayer that other property is underassessed or assessed "at a less percentage of value than his own property" (Code, section 1450; Appendix, p. 66), and each property owner affected by such complaint must be accorded notice and hearing, with the right to offer counter-evidence (Code, section 1453, Appendix, p. 66). Since the proof shows local assessments at a uniform percentage of actual value within the jurisdiction of each local assessor, no taxpayer has ground,

motive or incentive to so invoke review by the State Board.

The State Supreme Court presumed compliance with conditions clearly impossible of performance.

Sioux City Bridge v. Dakota County, 260 U. S. 441, 447;

Iowa-Des Moines Nat. Bank v. Bennett, 284 U. S. 239, 247.

A presumption that complaints of underassessments were in fact filed with the State Board, and that the Board issued multiple notices, conducted hearings thereon, and increased assessments to actual value, would pile presumption upon presumption, in violation of well-established rules of judicial procedure. Certainly constitutional rights to equal protection of the law may not be so defeated.

United States v. *Ross*, 92 U. S. 281, 284.

The proof negatives any presumption that underassessments made by local assessors were in fact increased to actual value by the State Board (Brief, pp. 58-64).

Petitioner particularly invokes the ruling of this Court in *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 518, wherein, approving and quoting the opinion of Mr. Justice Taft in *Taylor* v. *Louisville & N. R. Co.*, 88 Fed. 350, 362, the court, speaking through Mr. Justice Pitney, said:

> "After pointing out the similarity of the case to Cummings *v.* National Bank, *supra*, and declaring (p. 372): 'An intentional undervaluation of a large class of property when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law,' the court further said (p. 374): 'The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded

as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, *makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault or fraud or intentional discrimination.*'" (Italics added.) (244 U. S. 518.)

The ruling of the Supreme Court of Tennessee is in direct conflict with the quoted ruling of this Court.

The opinion of the Supreme Court of Tennessee contains the further statement:

> "It is argued that property generally, throughout the state, is assessed for taxation at less than cash value, and that the court should take judicial knowledge of such underassessment. Whatever may have been the practice in this regard in former times, it is our belief that since 1930 assessments generally are and have been higher than the actual cash value of the property assessed."
>
> Appendix, pp. 81-82; R. 133.

This is an expression of opinion of the members of the court as individuals. It does not purport to be responsive to any evidence in the record. It was made, as the context indicates, only in response to petitioner's argument that the Court should take judicial notice of the *system* of underassessment now as in *Wray* v. *Railroad*, 113 Tenn. 544, 560, and was not intended to interpose the personal belief of the members of the Court against the proof of underassessment contained in the record. The local tax assessor, said that court in *Treadwell Realty Company* v. *Memphis*, 173 Tenn. 168, 175, "is the man presumably most familiar with the

values of property" in his community. The interposition of the personal opinion of a judge, with respect to an issue with which he cannot be presumed to be familiar, to off-set the undisputed testimony of witnesses so qualified, would indicate bias amounting to a denial of due process of law, and the court's statement, with its context, should not be so construed.

The rights under the Federal Constitution having been especially set up and claimed in the State court, it is the province of this Court to inquire not merely whether they were denied in express terms but also whether they were denied in substance and effect, and neither the findings of fact nor conclusions of the State court control the decision of this Court on the merits of the asserted claim.

Adam v. *Saenger*, 303 U. S. 59, 64;
Norris v. *Alabama*, 294 U. S. 587, 589-590;
Sterling v. *Constantin*, 287 U. S. 378, 398.

The assessment under review purports on its face to fix for assessment the actual cash value of the property (R. 33-38). The statute so requires. Tennessee Code, Secs. 1526-1535. The method of assessment, by valuation of a system of railroad extending through four States, with an allocation to Tennessee of a portion of such value, precludes any method other than assessment according to actual value. It has not been contended by the State in this litigation that the assessment was not made on the basis of actual value, and the opinion of the Supreme Court of Tennessee treats the assessment as having been made at actual cash value. The only evidence to the contrary is that the assessment is at a sum grossly in excess of the actual cash value of the property.

That the assessment of petitioner's property for taxation at actual value, while the property of citizens generally is intentionally and systematically assessed for the same tax

at values substantially less than actual cash value, when the Constitution of the State permits no such classification of property for taxation, operates to deny to the petitioner the "equal protection of the law" and "due process of law" guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, is firmly established by the decisions of this Court.

Cummings v. *Merchants Natl. Bank*, 101 U. S. 153;
Sioux City Bridge v. *Dakota County*, 260 U. S. 441-446;
Greene v. *Louisville & I. R. Co.*, 244 U. S. 499, 516-518;
Bohler v. *Calloway*, 267 U. S. 479;
Cumberland Coal Co. v. *Board*, 284 U. S. 23;
Iowa-Des Moines Nat. Bank v. *Bennett*, 284 U. S. 239;
Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20.

The decision of the Supreme Court of Tennessee is not in accord with the decisions of this Court above cited. The Federal rights and immunities invoked are substantial and have been wrongfully denied by the decision below. The petitioner is entitled to the writ of certiorari, and to the judgment of this Court that the assessment under review may not be enforced in any sum in excess of two-thirds the actual value of the property as found by the assessors.

Assignment of Errors.

The Supreme Court of Tennessee, by its decisions and judgments of December 16, 1939, affirming the judgment of the Circuit Court of Davidson County, dismissing petitioner's original petition for the writs of certiorari and supersedeas to the State Board of Equalization, and of January 20, 1940, denying petitioner's application for rehearing, erred in the following particulars:

1. Petitioner's rights under the "due process of law" clause and the "equal protection of the law" clause of the Fourteenth Amendment to the Constitution of the United

States are denied by the assessment of its property for taxation for the years 1938-1939, and by the judgments giving effect thereto, because said assessment is based upon a valuation of said property made by the assessors arbitrarily, employing unreasonable and arbitrary methods not likely or calculated to produce a fair or just result, and is grossly in excess of any value shown by or reasonably deducible from any evidence presented to or considered by the assessors.

2. The assessment, based upon a valuation grossly in excess of the reasonable value of the property to be taxed, arbitrarily reached by methods not likely to produce a fair or just valuation, applied to property devoted to and employed as an agency of interstate commerce, imposes upon interstate commerce an unreasonable and discriminatory burden, in violation of the commerce clause of Article 1, Section 8, of the Constitution of the United States.

3. The assessment, and the judgments giving effect thereto, deny to petitioner its right to due process of law and equal protection of the law, guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, because the value of petitioner's distributable property in Tennessee was assumed by the assessors to be correctly measured by the product of the average value per mile of system property, located in four States, and the number of road miles in Tennessee, and the assessment is made at the value so arrived at, without a finding by the assessors that the property in the four States was of uniform value; said measure or test of value having been applied notwithstanding uncontradicted evidence that the property in Tennessee was of substantially less value than the system average and the finding by the assessors that the several branches and divisions of the railroad varied in value from $3,300 per mile to $37,200 per mile.

4. The assessment, and judgments giving effect thereto, deny to petitioner the equality in taxation required by the Constitution of Tennessee, Article 2, Sections 28 and 29, and the due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that petitioner's property in Tennessee is subjected thereby to *ad valorem* taxation at its actual cash value (and in fact at a valuation grossly in excess of actual value), while the general mass of property in the State, and particularly in the counties wherein petitioner's property is taxed, is wilfully, intentionally and systematically assessed for the same taxation at an arbitrary percentage of actual value of which the average is not more than 66⅔, and in no case exceeding 75 per cent.

5. The decision of the Supreme Court of Tennessee, in permitting the unconstitutional discrimination in taxation made the basis of paragraph 4 above, ruled in direct conflict with the decisions of the Supreme Court of the United States, in the following paragraph of its opinion:

> "If the county assessors and the few members of county boards of equalizers making affidavits on the hearing before the Commission assessed property at less than actual value, and did so intentionally and systematically, there is no showing whatever that the members of the State Board of Equalization violated their oath of office by underassessing property. In the absence of a contrary showing, it must be assumed that the State Board did their duty. There is neither allegation nor proof that the State Board intentionally and systematically refused to equalize assessments at actual value. The good faith of such officers and the validity of their actions are presumed. Sunday Lake Iron Co. *v.* Wakefield, 247 U. S. 350, 62 L. Ed. 1154. In order to support a claim of discrimination under the equal protection clause of the Fourteenth Amendment there must be something that amounts to an intention

or the equivalent of fraudulent purpose to disregard the fundamental principle of uniformity."
(R. 131-132; Appendix, p. 80.)

Prayer.

Premises considered, your petitioner, The Nashville, Chattanooga & St. Louis Railway, respectfully prays that the writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of Tennessee, at Nashville, Tennessee, the highest court of that State, commanding that said court certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case filed and had under the name and style The Nashville, Chattanooga & St. Louis Railway, plaintiff-in-error v. Gordon Browning, et al., defendants-in-error, at the December term, 1938, and at the December term, 1939 of said court; the said case having been filed in said court on the appeals in the nature of a writ of error of both parties thereto, from the Circuit Court of Davidson County, Tennessee; and petitioner prays that upon consideration of said record and this petition that the judgment of the Supreme Court of Tennessee be reversed, and that judgment be entered protecting and preserving the constitutional rights of petitioner herein invoked, and that petitioner have such further and other relief in the premises as to this Court may seem proper and just.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
Petitioner,

By WM. H. SWIGGART,
EDWIN F. HUNT,
SETH M. WALKER,
W. A. MILLER,
Attorneys.

March 5, 1940.

STATE OF TENNESSEE,
Davidson County:

W. H. Swiggart, being duly sworn, makes oath that he is one of the attorneys for the petitioner herein, The Nashville, Chattanooga & St. Louis Railway; that he is familiar with the facts and proceedings stated in the foregoing petition, which he prepared, and that the same are fully and truly stated to the best of his knowledge, information and belief.

W. H. SWIGGART.

Subscribed and sworn to before me at Nashville, Davidson County, Tennessee, on this March 2nd, 1940.

W. P. SENSING,
[SEAL.] *Notary Public.*

SUPPORTING BRIEF.

I.

The Petitioner is Entitled to Relief from a Grossly Excessive Assessment, Arbitrarily Made.

A. *Applicable Decisions.*

"The principles governing the ascertainment of value for the purposes of taxation are the same as those that control in condemnation cases, confiscation cases and generally in controversies involving the ascertainment of just compensation."

Great Northern Ry. v. *Weeks*, 297 U. S. 135, 139.

"Judicial knowledge must be taken of the fact that late in 1929 there occurred a great collapse of values of all classes of property—railroads, other utilities, commodities and securities, and that the depression then commenced progressively became greater."

Great Northern Ry. v. *Weeks*, 297 U. S. 135, 149.

It is the duty of the Court to determine the merits of the taxpayer's claim "that the assessment of his property was arbitrarily made and is grossly excessive." Upon showing that "the methods or system" by which the assessment under review was made were "plainly calculated to produce a grossly excessive assessment," the taxpayer is entitled to relief, notwithstanding his submission to over-taxation in previous years.

Great Northern Ry. v. *Weeks*, 297 U. S. 135, 151-152.

"In cases such as this, courts are not permitted to weigh evidence of value. They may not substitute their opinions for the findings of assessing officers or boards. But when the jurisdiction of the district court is appropriately invoked, it is its duty to decide upon the merits of the taxpayer's claim that the assessment of his property was arbitrarily made and is grossly excessive."

Great Northern Ry. v. *Weeks*, 297 U. S. 135, 151;
Bailey v. *Megan*, (Eighth Circuit) 102 F. (2d) 651.

"The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproduction new, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to its value in operation. Smyth *v.* Ames, 169 U. S. 466, 547. Much weight is to be given to present and prospective earning capacity at rates that are reasonable, having regard to traffic available and competitive and other conditions prevailing in the territory served. No intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that cannot earn a reasonable rate of return on its bare bones—as the mere tangible elements properly may be called. See Omaha *v.* Omaha Water Co., 218 U. S. 180, 202."

Southern Ry. v. *Kentucky*, 274 U. S. 76, 81-82.

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."

Cleveland, C., C. & St. L. Ry. v. *Backus*, 154 U. S. 439, 445;
Franklin County v. *Railroad*, 80 Tenn. 521, 539.

"It must be the present and potential ability of this property to earn in competition with other existing forms of transportation which is determinative of its value. An estimate of value in excess of the amount

upon which, it can honestly be believed, the property is capable of earning an acceptable rate of return, cannot be sustained. Compare Great Northern Railway Co. v. Weeks, *supra*, 297 U. S. page 151, 56 S. Ct. 426, 80 L. Ed. 532.

"A computation of system value based upon average market price of stocks and bonds and a computation based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings, but original cost and cost of reproduction do not reflect adverse economic factors, whether temporary or permanent."

Bailey v. *Megan*, (Eighth Circuit), 102 F. (2d) 651, 655.

"In determining the value of the property of a railway company for the purposes of taxation, several classes of evidence are admissible; but the net earnings of the property and the market value of its stocks and bonds for a reasonable period antecedent to the making of the assessment constitute the most reliable and influential evidence of that value."

Chicago & N. W. Ry. Co. v. *Eveland*, (Eighth Circuit), 13 F. (2d) 442, 443.

"It is clear that if the assessments made by the taxing authorities were so grossly excessive as to be unreasonable, and were arrived at by the adoption of fundamentally wrong principles, they were not final and a Federal court of equity has power to grant relief because taxation based upon such valuations deprives the Company of its property and denies it the equal protection of the law. * * * "

City of Detroit v. *Detroit & Canada Tunnel Co.* (Sixth Circuit), 92 F. (2d) 833, 836.

"There is no doubt that neither the net revenue of an operated railroad, nor the current market value of its stocks and bonds, nor any other class of competent evi-

dence is the sole criterion by which the value of railroad property for purposes of taxation must be determined. But there are some classes of evidence upon this subject that under the established rules of law and evidence and in reason are entitled to far greater influence in determining such value than others. After a thoughtful reading and deliberate consideration of all the evidence regarding the fair value of the property of the plaintiff in South Dakota assessable by the defendant tax commission in the light of the established rules of law and evidence, to which reference has now been made, we are unable to resist the conclusion that the tax commission of South Dakota and the court below in their consideration of that evidence and in their finding of the value of the property of the plaintiff in South Dakota *fell into a decisive error of law in that they failed to give to the fact that the plaintiff derived no substantial net earnings from this property in South Dakota in 1921, or in any of the four previous years, and to the market value of the stocks and bonds of the plaintiff, the decisive influence in determining the value of the property under consideration to which they were entitled.*" (Italics added.)

Chicago & N. W. Ry. Co. v. *Eveland*, (Eighth Circuit) 13 F. (2d) 442, 448.

Exaction of a State property tax measured by an excessive assessment of the property of an interstate railroad constitutes a discriminatory and direct burden on interstate commerce, contrary to and prohibited by Article 1, section 8, of the Constitution of the United States.

Western Livestock v. *Bureau of Revenue*, 303 U. S. 250;

Raymond v. *Chicago Traction Company*, 207 U. S. 20, 35-36.

"The assessable value for taxation of a railroad track can only be determined by looking to the elements on which the financial condition of the company de-

pends, its traffic as evidenced by the rolling stock and gross earnings in connection with its capital stock."[7]

Franklin County v. *Railroad*, 80 Tenn. 521, 539; *Railroad* v. *State*, 55 Tenn. 663, 800.

The test of value for assessment in Tennessee is expressly defined by statute as "the amount of money the property would sell for, if sold at a fair voluntary sale." Code of Tennessee, section 1349; Appendix, p. 65.

B. *The Evidence.*

1. The assessment was made by first placing a value upon the property as a whole and then breaking it down. Statement of Mr. Dunlap, Chairman of Railroad and Public Utilities Commission, (R. 155-156).[8]

Exhibit No. 4 to the testimony of L. E. McKeand sets forth the income produced by every class of property of petitioner, excepting only income from tax-exempt securities, for seven years (R. 308). Income from non-operating property is included because the assessors placed an overall valuation on both operating and non-operating property. The composition of the exhibit is explained by Mr. McKeand, petitioner's chief accounting officer, at (R. 297-298).

Capitalization of the seven-year average income (before fixed charges) at six per cent would product a system value of $16,021,298, to be compared with the $23,996,604 found by the assessors.

The 1937 income was less than the seven-year average, producing a capitalized system value of only $15,127,588.

Operation of the property for seven years, 1931-1937 inclusive, failed to meet the fixed charges, interest on bonds

[7] "Gross Earnings," in the above quotation, obviously means gross income, before fixed charges and dividends are paid, and not gross revenue.

[8] The statement of the Chairman at this point that the tax return does not show revenues for the State demonstrates an unfamiliarity with the record on which the assessment was made. See original tax return, pp. 18, 20, 21.

and rent of leased road, by an annual average of $553,537.73; producing an aggregate operating deficit for the period of $3,874,750 (R. 308).

The ratio of petitioner's fixed charges to operating revenues is nearly one-third less than the national average for all Class I Railroads. (Evidence, McKeand and Exhibit No. 7, R. 300, 311.)

The Railroad Commission gave little or no weight to the average income produced by the property as evidence of its value. See statements of Commissioner Jourolmon, (R. 178-179).

Seventy-three per cent of the capital stock of the petitioner is owned by the Louisville and Nashville Railroad Company, favorably affecting the market price of petitioner's capital stock and bonds. Ev., Fitzgerald Hall, (R. 224).

137 miles of the system main track, between Chattanooga, Tennessee, and Atlanta, Georgia, are leased from the State of Georgia, by a fifty-year lease made in 1917. No securities are outstanding against this mileage. Ev., McKeand, (R. 300-301).

230 miles of main track, operated by petitioner under a 99-year lease from the Louisville and Nashville Railroad Company, are bonded for $4,619,000. These bonds are general obligations of the Louisville and Nashville Railroad Company, and their market value reflects the financial condition of that Company rather than the value of the leased lines. Ev., McKeand, (R. 301).

A very small part of petitioner's capital stock is subject to purchase and sale, and in 1937 the total number of shares bought and sold was only 4.38 per cent of the total. Only 3.09 per cent of petitioner's outstanding bonds were traded in during 1937. Exhibit No. 37 to Ev. Fitzgerald Hall, (R. 240). Mr. Hall testified: "The very small percentage of

outstanding securities purchased by the public during the seven-year period since 1931 indicates that purchases have been induced largely by the hope of speculative re-sale profit" (R. 224).

Two of the important traffic centers reached by petitioner's system are Memphis, Tennessee and Atlanta, Georgia. Both are reached by the leased lines. It is impossible to ascertain or estimate how much of the actual value of petitioner's owned lines, reflected in the market price of its stocks and bonds, is derived from and dependent upon the leasehold interest in the leased lines.

On the assessment date, January 10, 1938, the aggregate market value of the capital stock and all outstanding securities issued by petitioner was $16,312,000. Non-taxable securities owned by petitioner had a value of $2,081,774,[9] leaving a balance of $14,230,226, representing the value of taxable property as indicated by the market value of the stocks and bonds. Original tax return filed with printed record, pp. 16-17.

The average market value of petitioner's securities, with non-taxable values deducted, for seven months of 1938 was only $12,532,274. For the seven-year period, 1931-1937 inclusive, this average was $24,609,690.[10] Exhibit No. 51 to Ev. Fitzgerald Hall (R. 254).

Combination of the two measures of value in accord with established methods approved by this Court in *Great Northern Ry.* v. *Weeks*, 297 U. S. 135, and in *Rowley* v. *Chicago & N. W. Ry.*, 293 U. S. 102, produces the following result:

[9] (Note—Tennessee taxes the income from all interest-bearing evidences of debt, including corporate dividends, in lieu of the *ad valorem* tax on stocks and bonds. Public Acts, 1931, 2nd Extra Session, chapter 20; Williams Code of 1932, Sections 1123.1-1123.34. *Hamilton Nat'l Bank* v. *Shipp*, 160 Tenn. 311, 315.

[10] Includes $840,000 equipment trust bonds, issued 1937, added at par to stock and bond total. Tax Return, p. 14.

Value of Stocks and Bonds, 7-year average	$21,609,690
Capitalization of Earnings, 7-year average	16,021,298
Total of two measures of value	37,630,988
Average of two measures of value	18,815,494

The value so shown is five million dollars less than the system value fixed by the assessment. The valuation made by the assessors is therefore more than one-fourth greater than the maximum value upon which "it can honestly be believed the property is capable of earning an acceptable rate of return," in excess of which a valuation for taxation "cannot be sustained." *Bailey* v. *Megan* (C. C. A. 8th Circuit), 102 F. (2d) 651, 655.

2. Evidence of the permanent destruction of former values in petitioner's system of railroad demonstrates the error of the assessors in using former assessments as a basis for the present assessments. See statements of Commissioner Jourolmon (R. 179); opinion of Board of Equalization (R. 101, App., 69).

The statement of the Commission's spokesman in argument to the Board of Equalization that the assessment of 1936 was agreed to is not supported by the record, and was so noted in the dissenting opinion of Mr. Justice McKinney (App., 87).

Acquiescence in previous overassessments is not material to a present claim of gross excess. *Great Northern Ry* v. *Weeks*, 297 U. S. 135, 152.[11]

[11] National Tax Association Proceedings (1938) quote Mr. George W. Mitchel, Director of Research of the Illinois Tax Commission, as saying: "It has therefore been increasingly necessary for railroads to establish lower values for their properties in terms of the factors recognized by statutes and decisions of State and Federal courts. More than ever both railroads and assessors look upon assessments as dependent upon factual considerations. It is incumbent upon the railroads today to prove their case in conclusive terms before they can obtain any consideration from assessment officials. The declining railroad fortunes have eliminated any satisfactory solution in terms of that sacred bull, *Last Year's Assessment*,

The destructive effect on the taxable value of petitioner's railroad system of the advent and growth of competitive forms of transportation, by highway, water and air, aided by governmental subsidy, is graphically portrayed in the testimony of petitioner's president, Fitzgerald Hall, and its traffic manager, Charles Barham, to which reference is here made. Ev. Mr. Hall (R. 191); Ev. Mr. Barham (R. 255).

Exhibits Nos. 23 and 24 to Mr. Hall's testimony demonstrates that the reduction of petitioner's traffic, resulting both from economic depression and permanent revolution in public transportation, is substantially greater than the national average (R. 233).

Failure of the railway system to earn the "fair return" approved by the Interstate Commerce Commission in any year is shown by Exhibit No. 38 to Mr. Hall's testimony (R. 241).

The exhibit map (R. 590-C), indicates the particular effect on this Railway of the Tennessee Valley Authority's navigation improvement program. Already the Railway has lost to barges gasoline tonnage producing half a million dollars a year. Exhibit No. 16 (R. 230). And the T. V. A. reports: "The signs point to heavy barge traffic in petroleum products, grain and grain products, forest products, steel, coal and coke" (R. 198).[12]

Thirty-eight per cent of the system road miles are branch lines, formerly profitable feeders to the main lines, but now reduced to loss-producing burdens, operated in the public interest. Ev. Barham (R. 259-261). This 38 per cent of

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or his handmaiden the *Judgment of the Commission*. "This is not fortunate since there is scant justification for perpetuating the [illegible] blunders or prejudices of previous assessing agencies. . . ."

[12] Commissioner Joseph B. Eastman:

"In the old days the railroad could count, with the growth of the country upon a corresponding and rapid growth of traffic which depression might interrupt but could not check. They cannot count on such growth now, and they have a transportation machine built for a volume of production which far exceeds the present demand" (R. 205).

mileage carries only 4.4 per cent of the system ton miles and only 1.2 per cent of the system passenger miles. The traffic density of the branches is only 7.4 per cent of the main lines. Ev. McKeand (R. 296).

This high percentage of unprofitable branch line mileage renders useless any comparison of the assessment per mile of this Railway with the per mile assessment of other railroads. No other railroad in Tennessee is so situated.

The traffic of this Railway is highly competitive, making necessary the operation of freight trains on more frequent schedules, at greater speeds, and with fewer cars than the average for the nation. Ev. Barham (R. 285-288). Much of the traffic is seasonal, increasing the empty back-haul movement of cars. Ev. Mr. Barham (R. 286). This condition increases operating expense and reduced net operating income. Ev. McKeand (R. 295). Operating costs per revenue dollar are substantially greater for this Railway than the national average. Table, Exhibit No. 19 (R. 499).

Agency stations of the system in 1920 numbered 231. In 1937 only 86 remained. Ev. Mr. Hall (R. 216-217); Exhibit No. 30 (R. 236-239).

Since 1929, 127.72 miles of main track, assessed at $754,146, have been abandoned (Ev. Mr. McKeand, Exhibit No. 6, R. 310-A; Ev. Barham, R. 261-262).

The rolling stock of the Railway is not modern. Much of it is idle and out of repair. With a book value of $7,618,129, maintenance costs in 1937 reached $3,481,509 (Ev. McKeand, Exhibit No. 1, R. 304). Deferred maintenance aggregates $1,339,276 (Exhibit No. 46, R. 224). The average age of locomotives is 26 years, of passenger cars 22 years, and of freight cars 21 years. Only 20 per cent of the locomotives are under 20 years old (Ev. Fitzgerald Hall, R. 216, 220; Exhibit No. 47, R. 245-247).

The average age of the railway shop buildings is from 29 to 39 years, of freight depots in the larger cities 35

years (Exhibit No. 29, R. 235). Needed repairs have been deferred for lack of revenues (Hall, R. 219-220; Exhibit No. 46, R. 244). Eighteen bridges, more than 45 years old, are on falsework or operated under "slow orders" (Hall, Exhibit No. 50, R. 253).

Excessive governmental taxes and imposts on the use and operation of property necessarily reduce its value. Taxes paid by petitioner from each revenue dollar have increased from 2.54 cents in 1916 to 6.13 cents in 1937 (Ev. McKeand, R. 293). In seven years a tax bill of $4,000,000 has produced a net corporate deficit of $2,708,000 (Ev. Hall, R. 218-219). Other substantial increases in operating costs are listed by Mr. McKeand (R. 293-294).

Depletion of natural resources in the territory served by the Railway, formerly productive of large revenue, is demonstrated in Exhibit No. 48 to Mr. Hall's testimony (R. 247) *et seq.*, explaining in part the destruction of value of the branch lines (Ev. Hall, R. 220-221).

The "general balance sheet," Exhibit A to the tax return, is made up in accord with the accounting rules of the Interstate Commerce Commission. Assets are listed under the caption "Investment," and the statement purports to give only investment costs, against which no depreciation or obsolescence charge is made, except with respect to rolling stock. It is therefore no evidence of the present value of the physical property subject to assessment.

The record contains no evidence of the reproduction cost less depreciation, of the property at the date of the assessment (Ev. McKeand; R. 299-300).

The foregoing is only an outline of some of the material evidence of diminished and diminishing value of the property assessed, demonstrating that the arbitrary and inadequate methods of valuation specified in the petition for

certiorari have produced a grossly excessive and unjust assessment.

II.

Allocation of System Value to Tennessee.

A. *Applicable Decisions.*

Allocation of system value to a State must be "arrived at by the exercise of sound judgment based on facts that fairly reflect the relation between value of the system as a whole and value of the part within the State."

Great Northern Ry. v. *Weeks*, 297 U. S. 135, 144;
Rowley v. *Chicago & N. W. Ry.*, 293 U. S. 102, 109-110;
Wallace v. *Hines*, 253 U. S. 66;
Union Tank Line v. *Wright*, 249 U. S. 275;
Fargo v. *Hart*, 193 U. S. 490, 500;
Pittsburgh etc. Ry. v. *Backus*, 154 U. S. 421;
Southern Ry. Co. v. *Kentucky*, 274 U. S. 76.

"So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable."
Fargo v. *Hart*, 193 U. S. 490, 500.

B. *The Evidence.*

The value found for the distributable property for the entire system is allocated to Tennessee on the sole basis of road mileage (Assessment, R. 37).

The valuation by the assessors of the several divisions and branches of petitioner's railroad at sums ranging from $3,300 per mile to $37,200 per mile, conclusively rebuts any presumption that the several parts of the system are of equal value (Assessment, R. 38).

The table of miles and values for assessment, reported by the assessors, shows on its face that only 301 miles of

the 800.02 miles of road in Tennessee are assigned a value as great as the average value per mile ($16,158.27) found for the system (R. 38).

The values assigned by the assessors to the several divisions or branches demonstrate the excessive valuation of the parts in Tennessee. The total mileage of each division and branch is shown on the original tax return, filed with the printed record, at page 10. Application of the values reported by the assessors for each division and branch in Tennessee (R. 38) to the total mileage of each such division and branch produces an aggregate value for distributable property which exceeds the value found for the system by $1,645,514, allowing nothing for the Rome branch of 18 miles no part of which is in Tennessee.

There is no uniformity of value in the mileage constituting the system. Thirty-eight per cent is branch line mileage, of which the tonnage density is only 7.4 per cent of the main lines. Of this unprofitable branch line mileage 74.5 per cent is in Tennessee (Ev. McKeand, R. 296).

Allocation on the sole basis of road mileage subjects 71.73 per cent of the value of the system distributable property to taxation in Tennessee. For each one per cent of value so allocated to the State the assessment is increased by $180,221.

The investment cost of the physical properties, other than rolling stock, of the system as valued and located by the Interstate Commerce Commission (31 I. C. C. Valuation Reports, p. 567) brought to date under the Commission's supervision, without deduction for depreciation, shows only 64.11 per cent of the system property in Tennessee (Ev. McKeand, R. 295-6; Exhibit No. 5, R. 310).

The tax return allocates or assigns railway operating revenues and expenses of the system to Tennessee, in accord with a formula attached to the return. Net railway

operating income earned by the Tennessee mileage, so computed, was in 1937 only 51.5 per cent of that earned by the system. The net railway operating income per mile of track in Tennessee was less than half (41.84 per cent) the income per mile of track in other States (Ev. McKeand, R. 302-3; Exhibit No. 8, R. 308).

Exhibit No. 3 to the testimony of L. E. McKeand (filed at R. 296) is a statement of traffic and operating units of the system for 1937, divided between the Tennessee mileage and that outside Tennessee. The exhibit, at R. 307, shows the following ratios:

Tennessee proportion of system traffic units (ton miles and passenger miles)	68%
Tennessee proportion of car and locomotive miles	69.06%

The evidence showing without contradiction an absence of uniformity in the value of the system mileage, petitioner submits the following table as a reasonable test of the relative value of the system distributable property and that part in Tennessee:[13]

Tennessee's proportion of investment cost	64.11%
Tennessee's proportion of traffic units	68.00%
Tennessee's proportion of car and locomotive miles	69.06%
Tennessee's proportion of track mileage	71.73%
Tennessee's proportion of net operating income	51.50%
Average	64.05%

[13] James W. Martin, Commissioner of Revenue for Kentucky, writing in "Taxes—The Tax Magazine," March, 1939, says:

"Therefore, the theory of allocation of a unit assessment is that the allocation shall be reasonable and shall reflect the elements in the situation which have to do with the value of the lines itself. For this reason not only the cases handed down by the courts but also the literature reporting independent economic studies of the problem agree that two or more allocation factors reflecting physical property and two or more allocation factors reflecting operating experience shall be utilized in arriving at a fair

The average of these percentages is 64.05 per cent, measuring the percentage of system value assignable to Tennessee upon consideration of the several factors of mileage, cost, use, traffic and income. The result, assuming the validity of the Commission's finding of system value, compared with allocation by mileage alone is:

Allocation on mileage alone, 71.73% of $18,022,133	=	$12,926,944
Allocation on combined factors, 64.05% of $18,022,133	=	$11,543,177
Excess of assessment over true value	=	$1,383,767

Whether the above formula or some other like formula be used should probably be left to the reasonable judgment of the assessors. The proof herein shows that road mileage alone does not fairly reflect the relation between value of the system and value of the part within the State of Tennessee. The assessors have not exercised the sound judgment required by the cited rulings of this Court. The allocation based on mileage alone should be adjudged to have been made arbitrarily, and the assessors required to exercise their sound judgment in arriving at a reasonable basis for the division of system value between the taxing States.

III.

Equalization in Assessment Denied to Petitioner.

A. *Applicable Decisions and Statutes.*

Article 2, Sections 28 and 29, of the Constitution of Tennessee provides:

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allocation. There is no pretense on the part of realistic economists that the value actually allocated is the separate value in that state; it is rather simply a reasonable share of the aggregate value of the operating entity.

"* * * All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. * * *" (Section 28.)

* * * * * * *

"The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. * * *" (Section 29.)

"The sole and manifest purpose" of the provision for taxation according to value "was to secure uniformity and equality of burden", etc.

Treadwell Realty Co. v. *Memphis*, 173 Tenn. 168, 174.

Sections 1526 and 1535 of the Tennessee Code of 1932 direct that the Railroad Commission and the Board of Equalization shall ascertain the "actual cash value" of property assessed by them and that "the valuation so fixed shall be assessed against said property." (Copied in dissenting opinion of Mr. Justice McKinney, App., pp. 84, 86.)

"All property of every kind shall be assessed at its actual cash value. The term, 'actual cash value', is defined to mean the amount of money the property would sell for, if sold at a fair, voluntary sale." Code of Tennessee, Section 1349. (Quoted.)

The statutes providing for assessment of railroad property by a central authority were sustained by the Tennessee Court on the theory that they require assessment on the

same principle of actual value, required by the State Constitution for the assessment of all other property.

Chattanooga v. *Railroad Co.*, 75 Tenn. 561, 567, 569;
Knoxville v. *Ft. Sanders Hospital*, 148 Tenn. 699, 705-707.

It is now established as the law of the land that "where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." The assessment of the property of one or a group of taxpayers at full value, while the mass of property is intentionally and systematically assessed at less than full value, for payment of the same tax, violates the "due process of law" clause and the "equal protection of the law" clause of the Fourteenth Amendment to the Constitution of the United States, and provisions of Article 2, Sections 28 and 29, of the Constitution of Tennessee, amounting to a fraud upon the rights of the taxpayer.

Sioux City Bridge v. *Dakota County*, 260 U. S. 441-446;
Greene v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 516-518;
Cumberland Coal Co. v. *Board*, 284 U. S. 23;
Iowa-Des Moines Nat. Bank v. *Bennett*, 284 U. S. 239;
Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20;
Cummings v. *Merchants Natl. Bank*, 101 U. S. 153;
Bohler v. *Callaway*, 267 U. S. 479;
Taylor v. *Louisville & N. R. Co.*, 88 Fed. 350;
Trustees of Cincinnati Sou. Ry. v. *Guenther*, 19 Fed. 395;
Treadwell Realty Co. v. *Memphis*, 173 Tenn. 168;
Mobile & Ohio R. Co. v. *Schnepper*, 31 F. (2d) 587;
Washington Water Power Co. v. *Kootenai* (C. C. A. 1921), 270 Fed. 369;

People ex rel. v. *Illinois Central R. Co.* (1934), 355 Ill. 605, 190 N. E. 82;

Lively v. *Missouri, K. & T. Ry. Co.*, 102 Tex. 545, 120 S. W. 852;

West Pennsylvania Power Co. v. *Board*, 112 W. Va. 442, 164 S. E. 862;

Boonville Natl. Bank v. *Schlotzhauer*, 317 Mo. 1298, 298 S. W. 732, 55 A. L. R. 489;

Knox v. *Southern Paper Co.*, 143 Miss. 870, 108 So. 288, 290.

When this inequality of assessment is shown, it is immaterial that other like property of other taxpayers is subjected to the same discrimination.

Mobile & Ohio R. Co. v. *Schnepper*, 31 F. (2d) 587;

Washington Water Power Co. v. *Kootenai* (C. C. A.), 270 Fed. 369.

Testimony of local assessors that they intentionally assessed property in their respective jurisdictions at less than its full or actual cash value is both competent and "convincing" evidence of the fact, in a suit by a taxpayer whose property is assessed by a central board or commission.

Bohler v. *Calloway*, 267 U. S. 479, 481;

West Penn. Power Co. v. *Board*, 112 W. Va. 442, 164 S. E. 862.

In Tennessee "The remedy for the alleged error of the Board of Equalizers in the correction of inequality in assessments, which it is the primary duty of such a board to equalize, as its very name imports, is 'by certiorari in a court of law.'"

King v. *Bristol*, 156 Tenn. 643, 646;

W. J. Savage Co. v. *Knoxville*, 167 Tenn. 642, 646;

State ex rel. v. *Dixie Portland Cement Co.*, 151 Tenn. 53, 59.

Opinion evidence with respect to the value of real estate is universally recognized as excepted from the general opinion evidence rule. Mr. Wigmore reports that only the States of New Hampshire and New York ever questioned this proposition, and those States are now in accord with other jurisdictions in admitting such evidence. We quote from this work on Evidence as follows:

> "Our orthodox common law was not troubled with any doubts concerning value-testimony as tainted by the vice of opinion. It recognized fully that value-testimony necessarily involved 'opinion,' by which was meant a mere estimate, as distinguished from a knowing through the senses. But it also recognized that value-testimony had to be employed, and it was precisely one of the typical accepted instances (ante, Sec. 1917) in which 'opinion' was received. When the new sense of 'opinion' (as 'inference') came in (ante, Sec. 1917), and received its peculiar American development, it was then seen that the fundamentals of faith were brought thereby into the dark shadow of doubt, and that the question of the propriety of value-testimony had to be faced.
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> . . . . . .
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> . . . Why should a witness testify that the value of a piece of land was so much, when he could state its features sufficiently in detail and leave the jury to make their own inference? Fortunately, the futility of this argument was everywhere else seen; and, though the question was brought up and had to be settled in almost every other jurisdiction, it was settled in favor of receiving such testimony. This view was also afterward taken in New Hampshire (by legislation) and in New York."
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> *Wigmore on Evidence*, Vol. III, section 1940, pp. 2576-2577.

Local tax assessors are presumably the best qualified witnesses to testify with respect to the value of property within their respective jurisdictions.

Treadwell Realty Co. v. *Memphis*, 173 Tenn. 168, 175.

Local assessments are final, "except in so far as the same may be revised or changed by the State board of equalization." Code of Tennessee, section 1433, Appendix, p. 65.

Specific complaints, sworn to by a taxpayer, are a condition precedent to review by the State Board of Equalization of assessments made by local assessors. Code of Tennessee, section 1450, Appendix, p. 66.

Both the county board and the State Board of Equalization are prohibited from increasing any assessment made by county assessor except after notice to the owner and opportunity to be heard, with the right to introduce evidence before the State Board. Code of Tennessee, sections 1427, 1453; Appendix, pp. 65, 66.

Railroad assessments are not final until the actual cash value is fixed and certified by the State Board of Equalization. Code of Tennessee, sections 1534, 1535, 1536; Appendix, pp. 85, 86, 68.

B. *The Evidence.*

Assessments of real estate by county assessors are made for a biennium in the odd years; by the Railroad Commission in the even years. Tennessee Code, Secs. 1348, 1458. Taxes for 1938 were therefore levied on assessments completed in 1937 by the county assessors, while the 1938 assessment of railroads was not completed until the fall of 1938 (R. 89).

The evidence of the intentional underassessment of the general mass of property for 1938 taxation was taken in 1938 and refers to assessments completed in 1937.

No objection was made to the form, competency or materiality of any of the evidence in the record at any time.

In 1894 the attention of the Tennessee Legislature was directed to the practice then followed of assessing property at approximately one-half actual value (R. 324).

In 1915 a commission appointed by the Governor reported, after investigation, an established custom of assessments at ratios from 25 to 60 per cent of actual value. "In no case," the report states, "did any assessor state that the tax aggregate constituted more than 60 per cent of the value" (R. 325).

In 1920 "all property was revalued for tax purposes." Since 1920 the aggregate assessment of farm property has been decreased 49 per cent; the aggregate of all assessments made locally 28 per cent; while the aggregate of assessments made by the Railroad and Public Utilities Commission has decreased only 7 per cent (Ev. Pouder, R. 336-337).

The present assessment of petitioner's property is greater by 5 per cent than its assessment in 1920, notwithstanding the abandonment of more than 100 miles of main track in Tennessee (R. 327; Exhibit No. 6 to Ev. of McKeand, R. 310-A).

Continuance of the systematic and intentional underassessment of property by county tax assessors to and including the assessment of 1937, throughout the State, as an applied principle of assessment, is shown by the affidavits and reports of officers of the Tennessee Taxpayers Association, W. R. Pouder and W. P. Brooks, both of whom made oath to the verity of the reports exhibited by them. The investigation was made in the public interest and not for the purposes of this litigation. Mr. Brooks, in making the investigation, "visited and personally contacted the officials of each county and each city and town in the State of Tennessee" (R. 344). The reported estimates of the

ratio of assessed value to actual value, in his opinion, "represent the best information available on the subject" (R. 344).

Reference is specifically made to the entire testimony of Messrs. Pouder and Brooks, for the careful and impartial method by which their investigation and reports were made (Ev. Pouder, R. 333-340; Ev. Brooks, R. 343-344).

The ratio of assessments to actual value of the property in each county of Tennessee is given in Exhibit A to Mr. Pouder's testimony (R. 341-342). In no county is the assessed value in excess of 75 per cent of the estimated actual value (Affidavit, R. 338; Exhibit A, R. 341-342).

A second affidavit of Mr. Pouder, filed with the Board of Equalization (R. 448), verifies a later tabulation of assessments and actual values in each county and incorporated city and town of the State, compiled in the same manner as set out in his original affidavit. This table shows that in no county, city or town does the assessed value in 1937 [1] of property exceed seventy-five per cent of the estimated actual value; the average assessment rate for the counties being 60.8 per cent of the estimated actual value (R. 453) and for the cities 66.4 per cent (R. 459). Second affidavit Pouder, (R. 448); Tabulation (R. 450-459).

The investigation and reports of the Tennessee Taxpayers Association, through Messrs. Pouder and Brooks, are accepted as the basis of values of county and municipal securities by dealers and their customers, and their reports comparing assessed values and actual values, although widely used and distributed, have not been questioned. That assessments in Tennessee will not average more than 66 per cent of actual values "is a matter of common knowledge throughout the state." Ev. T. H. Mitchell (R. 345-346).

[1] The 1937 assessment of real estate was made for the biennium, 1937-1938. Code of Tennessee, Section 1348, Appendix, p. 65.

In support of the evidence of long continued custom and practice of underassessment above recounted, petitioner filed specific proof of adherence to the custom in twenty-seven of the thirty-one counties in which its property is located and taxed.

In Bedford County petitioner returned for assessment property valued at $548,430. Original tax return, pp. 24, 56. The county tax assessor, John S. Hart, testified that his predecessor in office assessed property "at approximately fifty (50%) per cent of its actual, or sale value." His statement continues:

> "* * * and during the tenure of office of this affiant, the assessments have remained the same, and have been made by affiant at approximately fifty (50%) per cent of the actual, or sale value of the property, with the exception of some few changes made by the County Equalization Board, with the general trend of such changes by such Board toward a decreased assessment, rather than an increased assessment in taxation" (R. 348).

In Franklin County petitioner's tax return shows property valued by it at $1,067,035. Original tax return, pp. 24, 60. The county tax assessor testified herein: "that in all of his assessments he has adopted a basis of approximately sixty (60) per cent of the actual or sale value of the property in making his assessments" (R. 380). The chairman of the county board of equalization testified that the board had "adhered to said percentage as nearly as possible in all cases" (R. 380-381).

The proof of intentional underassessment of property in Franklin and Bedford counties is typical of the proof of like assessments in the other counties, now briefly cited and referred to.

Benton County. Assessments at 50 to 60 per cent of actual value. Thirty-two parcels of land sold in 1937-1938, selected

at random from deed book, assessed at 54 per cent of recited sale price. Further testimony by county trustee and real estate agent (R. 353-357).

Carroll County. Assessments at 60 to 75 per cent of actual value. Testimony by tax assessor, county judge, county court clerk, farm land appraiser, and real estate agent (R. 358-362).

Cheatham County. Assessments two-thirds to three-fourths actual value. Testimony by three members county board of equalization and secretary of county farm loan association (R. 362-365).

Coffee County. Assessments at 65 per cent of actual value. Testimony by tax assessor, county trustee, and members county board of equalization (R. 366-369).

Dickson County. Assessments at 50 to 60 per cent of actual value. Testimony by county trustee, county judge, county court clerk and others (R. 370-373).

Fayette County. Assessments at 66⅔ to 75 per cent of actual value. Testimony by tax assessor, members of county board of equalization, and bank president (R. 374-378).

Grundy County. Assessments at 60 per cent of actual value. Testimony by tax assessor and county judge (R. 382-383).

Hamilton County. Assessments at 60 per cent of estimated actual value, shown by statement of county judge (R. 383).

Hardeman County. Assessments at 65 to 75 per cent of actual value. Testimony by member county board of equalization, bank cashier, county trustee and others (R. 384-387).

Haywood County. Assessments at 50 to 60 per cent of actual value. Testimony by county tax assessor, county trustee, members of county board of equalization, bank president and mayor of county seat town (R. 388-392).

Henderson County. Assessments at 66⅔ per cent of actual value. Testimony by county tax assessor and two members of county board of equalization (R. 393-395).

Henry County. Assessments at 50 to 75 per cent of actual value; average of 60 per cent. Testimony by county tax assessor, county trustee and chairman of county board of equalization (R. 396-398).

Humphreys County. Assessments at 66⅔ per cent of actual value. Testimony by county tax assessor and three members of county board of equalization (R. 399-401).

Hickman County. Assessments at 65 per cent of actual value. Testimony by county tax assessor, county trustee, and bank cashier (R. 402-405).

Lewis County. Assessments of real estate at 75 per cent of actual value. *No personal property assessed except that of two banks and a mining company.* Testimony of county tax assessor, chairman of board of equalization, county trustee and others (R. 406-414).

Lincoln County. Assessments at 66⅔ per cent of actual value. Testimony by tax assessor, chairman board of equalization, county trustee, and others (R. 415-417).

Madison County. Assessments at 65 to 75 per cent of actual value. Testimony by chairman and members board of equalization, deputy tax assessor, county trustee, city attorney, and bank president (R. 418-424).

Marion County. Assessments at 70 per cent of actual value. Testimony by four members of board of equalization (R. 425-427).

Marshall County. Assessments at 60 per cent of actual value. Testimony by county tax assessor, county judge, county trustee, and real estate agent (R. 428-429).

Maury County. Assessments at not exceeding 60 per cent of actual value. Testimony by two members board of equalization, bank officers and real estate agents (R. 430-434).

Obion County. Assessments at "approximately 65 per cent of actual value." Testimony by deputy tax assessor, county trustee, county judge and county court clerk (R. 435-436).

Rutherford County. Assessments at 60 to 65 per cent of actual value. Testimony by county tax assessor, secretary of board of equalization, and county trustee (R. 437-440).

Warren County. Assessments at 70 per cent of actual value. Testimony by county tax assessor, three members board of equalization, county judge and county trustee (R. 441-443).

Weakley County. Assessments at 70 to 75 per cent of actual value. Testimony by county tax assessor and bank vice-president (R. 444-445).

White County. Assessments at from 50 to 75 per cent of actual value. Testimony by county tax assessor and county trustee (R. 446-447).

These several county officers and citizens, representing all but four of the counties in which petitioner's property is located and taxed, have testified against their own interest in this proceeding.[15] There is no evidence to the contrary.

The evidence establishes a universal, accepted and systematic plan and scheme of intentional underassessment by county tax assessors. The action of the State Board of Equalization herein in declining to give effect to the uncontradicted evidence by reducing petitioner's assessment to at most 75 per cent of the value placed upon it, evinces a willful intent to disregard the constitutional requirement of equality, equivalent to fraud in law. *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 518; *Sioux City Bridge* v. *Dakota County*, 260 U. S. 441; *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239.

There is nothing to indicate that any assessment made by local assessors for 1938 taxation was reviewed by the State Board of Equalization on complaint of underassessment. Action by that Board was not required, except on sworn

[15] The four omitted counties contain a small percentage of petitioner's road mileage, and are included in the investigation and testimony of Messrs. Pouder and Brooks, cited above.

complaint of a specified assessment. Tennessee Code, sec. 1453, copied in appendix at p. 66. The Board, in its opinion (App. p. 68) herein, made no claim that it had taken any action with respect to assessments made locally. A board composed of state political officers, which certifies that its members did not have adequate time to even investigate a single case (Appendix, p. 69) cannot be presumed to have given notice and heard evidence of the value of all property in the State shown herein to have been intentionally underassessed. The petitioner had no standing to then complain for its assessment was not made until a year later. The Board clearly disclaimed notice of such underassessment of other property by its insubstantial criticism of petitioner's proof (App. p. 70). The ruling of the State Supreme Court that participation by the State Board of Equalization in the intentional underassessment of other property, while fixing petitioner's assessment at full value, was essential to the judicial relief of petitioner from the resulting unconstitutional discrimination, is a substantial denial of the "due process of law" and "equal protection of the law" guaranteed by the Fourteenth Amendment to the Federal Constitution, in direct conflict with the cited rulings of this Court.

Respectfully submitted,

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
By WM. H. SWIGGART,
SETH M. WALKER,
EDWIN F. HUNT,
W. A. MILLER,
Attorneys for Petitioner.

March, 1940.

APPENDIX.

1. Code of Tennessee. Sections Cited.

Section 1336.

1336. County tax assessors; election; term.—At the regular August election, 1932, and every four years thereafter, there shall be elected by the qualified voters of each county, one tax assessor for the whole county, who shall hold his office for four years from the first day of September following. (1907, ch. 602, sec. 9, subsecs. 1 and 3.)

Section 1348.

1348. Assessments made, how often.—In order to provide revenue for state, county, and municipal purposes, personal property, privileges, and polls shall be assessed annually, and real estate shall be assessed every two years, in the odd years. (1907, ch. 602, sec. 3; 1921, ch. 62, sec. 1.)

Section 1349.

1349. Assessment at "actual cash value," which is defined.—All property of every kind shall be assessed at its actual cash value. The term "actual cash value," is defined to mean the amount of money the property would sell for, if sold at a fair, voluntary sale. (1907, ch. 602, sec. 4.)

Section 1427.

1427. Notice to property owner when assessment is increased.—No assessment shall be increased by the county board of equalizers until the property owner or owners affected by said increase shall have been notified and given an opportunity to be heard. (1907, ch. 602, sec. 32.)

Section 1433.

1433. Board's action is final, except revision or change by state board.—When the county board of equalizers shall have determined the matter of equalization and values before it and within its jurisdiction, such action shall be final, except in so far as the same may be revised or changed by the state board of equalization. (1907, ch. 602, sec. 32.)

Section 1450.

1450. Taxpayers may complain of inadequacy and inequality of assessments, how and when.—Any taxpayer, or any owner of property subject to taxation in the state, shall have the right to a hearing and determination of any complaint he may make on the ground that other property than his own has been assessed at less than the actual cash value thereof, or at a less percentage of value than his own property or other property or that his own property has been assessed at more than its actual cash value, but such complaint shall be specific, in writing, and sworn to and filed with said board at least ten days before the adjournment of the annual session. (1919, ch. 1, sec. 7; 1921, ch. 113, sec. 9.)

Section 1453 (State Board of Equalization).

1453. May reassess after county board has acted; notice to property owner; no increase without the required notice; certificate to county court clerk.—Whenever said State board, after a county board has acted, has reason to believe that an assessment of real estate or personal property is inadequate, it shall have power to cause ten days' written notice to be served on the person to whom the property is assessed, commanding such person to appear before said board at the time and place to be fixed in said notice, to show cause why said assessment should not be increased. Said taxpayer shall be entitled to be heard by himself or counsel and shall have the privilege of introducing any competent evidence touching the question of adequacy of said assessment. Whereupon said board shall determine the amount, if any, said assessment shall be increased, and reduce its judgment to writing and certify its findings to the proper county court clerk. Said state board shall not have the authority to increase a single assessment without giving the notice herein required. (1921, ch. 113, sec. 11; 1919, ch. 1, sec. 8.)

Section 1523.

1523. Additional information and evidence as to values; evidence in writing; owner may submit evidence; records

open to inspection of owners.—The commission shall require in addition to the schedules and statements above referred to, such additional information, and take such additional evidence as to the value of any property to be assessed by them as may be deemed proper, but such additional evidence shall be reduced to writing and opportunity afforded, if desired, to the owner to submit additional evidence or counter-evidence to that required by said commission, and the records of the said commission shall at all times be open to inspection of the owner or owners of any property assessable under the provisions of this statute. (1919, ch. 3, sec. 3.)

Section 1509.

1509. Owners to file sworn schedules and statements of certain information.—It shall be the duty of the owners of property mentioned in the preceding section, within the State, to file with the commission on or before the first day of April, biennially, in the even years, under oath, schedules and statements giving the following information; concerning all properties owned or leased by such owners: (1) the name of the company, its nature, whether a person, association, copartnership, corporation or syndicate, and under the laws of what state or country organized; (2) the location of its principal place of business, the post office address of the president, general manager, or executive officer or officers; (3) the name and post office address of the chief officer or managing agent of the company in Tennessee; (4) the gross receipts of its business as a whole and also of its business done within the State, and operating expenses for the preceding fiscal year; (5) the total capital stock, number of shares issued or outstanding, the par face value thereof, and in case no shares of stock are issued, in what manner its capital is divided, and its holdings evidenced; (6) the market value of said shares of stock or capital on the 10th day of January next preceding, or if said stock or capital have no market value, then the actual value; (7) the real estate, buildings, machinery, fixtures, appliances and personal property owned by said company which is actually located within this state, the actual value

thereof and the counties or municipalities in which the same are located; (8) real estate, together with the permanent improvements thereon, situated outside of the State and not directly used in the conduct of the business within the State, the purpose for which it is used, its value and the sum at which it is assessed for taxation in the locality where situated; (9) the bonded indebtedness and the market value thereof, if it has such, otherwise its actual value. (1919, ch. 3, sec. 2; 1919, ch. 166, sec. 2.)

Section 1526 (Copied in dissenting opinion, herein p. 84).

Section 1533 (Copied in dissenting opinion, herein p. 85).

Section 1534 (Copied in dissenting opinion, herein p. 85-86).

Section 1535 (Copied in dissenting opinion, herein p. 86).

Section 1536.

1536. Amount of state, county, and municipal taxes to be fixed and certified.—As soon as the commission shall have received said valuations from the board of equalization, the commission shall ascertain the amount of State tax on the assessment and file with the comptroller a statement showing the amount of State tax to be collected from each, and the comptroller shall notify the owner of same by letter or otherwise, and the commission shall certify to the county court clerk of each county in which any of such property lies the amount to be taxed in said counties, respectively, for county purposes, and likewise to the mayor of any incorporated city or town the amount to be taxed by such city or town. (1919, ch. 3, sec. 12; 1921, ch. 39.)

2. Opinion of State Board of Equalization.

From Record, pp. 100-102.

N. C. & St. L. Railroad Company.

Appeal.

This appeal from the assessments made by the Public Utilities Commission, of the properties of the Company

located in Tennessee, was heard by the State Board of Equalization, upon the record as presented to said Commission, the exceptions filed to its assessment, additional affidavits, charts and reports of company official, argument of counsel and of representative of the Commission, and the entire record, and it is now before us for determination.

This appeal presents to the Board a difficult problem. Each member is ex officio. Therefore, adequate time is not ours to give the necessary investigation to entirely satisfy even ourselves, that we may reach an equitable conclusion. However, the responsibility is ours and we would not shirk it.

The exceptions filed are many, and are based upon every method known to the law, touching the valuation and assessment of railroad property, as well as the method used by the Commission, in fixing the assessment.

The assessment made by the Commission, for the years 1938-39 is $16,223,194.00 of Companies property or $276,804.00 less than the assessment made for the previous years of 1936-37, and from such former assessment the Company has appealed. The records of the Commission further disclose, that previous assessment of companies property, over a period of ten years follow:

1923-1924	$24,000,000.00
1925-1926	24,795,303.00
1927-1928	24,795,303.00
1929-1930	26,000,000.00
1931-	23,750,000.00
1932-1933	17,000,000.00
1934-1935	16,999,966.00;

the record before us shows that the Company agreed to the assessment made for the years 1936-1937. It will be seen, that the assessment made for the year of 1938-1939, is a substantial reduction from the high of 1929-1930, indeed, a reduction in the sum of $9,776,806.00. We are convinced that this reduction of companies assessment from the high point in recent years, is comparable with the reduction enjoyed by owners of other property, or any class of property, within the bounds of this State.

The Company objects to the method used by the Commission in reaching the valuation of its property. It appears in the record, and it was stated in argument, that the Commission, in reaching its conclusion, looked to the capital stock, corporate property franchises and gross receipts, the market value of the shares of stock and bonded indebtedness, and all evidence as afforded by the returns, statements and schedules made by the company. We assume that their statements are true, and we understand that these elements must be used, as a matter of law, in making such assessments.

Another objection is raised by the Company. That is, the governmental units throughout the State assess other property at less than its actual cash value, while in the same jurisdiction, the Commission assessed its property at its actual cash value, thereby violating the Constitution, on the subject of taxation. The affidavits of William H. Pouder, who is Executive Secretary of the Tennessee Taxpayers Association, and who has compiled a great deal of data of actual cash values, and assessed values of property in the various counties of the state. This information is very interesting, but we are not familiar with the method used by him in reaching his figures on actual cash value, nor do we know how the percentage of cash value was reached for assessable purpose. Many other affidavits are in the record purporting to establish that theory, but we think they are subject to the same objection as that of Mr. Pouder.

For the foregoing reasons, we are satisfied that the assessment of companies property is just and fair to it, and in line with all other like property within the State.

This assessment of companies property at $16,223,194.00 will stand.

Neither Governor Gordon Browning nor Commissioner Walter Stokes, Jr., participated in the hearing of this appeal.

(Signed) A. B. Broadbent.

Keaton & Edwards concur.

3. Majority Opinion of Supreme Court of Tennessee.

From Record, pp. 123-134.

Davidson Law.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
Plaintiff in Error,

v.

GORDON BROWNING, *et al.* (State Board of Equalization),
Defendants in Error.

OPINION.

The Nashville, Chattanooga & St. Louis Railway filed a petition for certiorari and supersedeas in the Circuit Court of Davidson County to review the action of the State Board of Equalization in fixing the value of petitioner's property for taxation. The trial judge dismissed the petition and an appeal has been taken to this court.

The Railroad and Public Utilities Commission is directed by statute (Code 1508) to assess for taxation, for state, county and municipal purposes, all of the property of every description, tangible and intangible, within the state, belonging to railroad companies and other named public utilities. It is provided that the Commission shall assess all of such property biennially, in even years, at its actual cash value as of the same date the properties of other persons are by law assessed. The owners of property assessable under the statute are required by Code 1509 to file with the Commission sworn schedules and statements of certain information.

Section 1526 of the Code is as follows:

> "Upon examination of every such schedule and statement and all other evidence taken by them, the said commission shall proceed to ascertain and determine the value of said property within the state for taxation and assess the same accordingly, taking into consideration the capital stock, corporate property, franchises, and gross receipts, the market value of the shares of stock and bonded indebtedness, and such other evidence

as is afforded by said statements and schedules or other evidence taken to enable them to fairly and equitably fix the actual cash value of the properties of such persons."

The railway filed its return with the Commission, and after considering the same, together with other evidence, the Board fixed the cash value of the railway's property in Tennessee, for taxation, at $16,223,199.00, for the biennium 1938-39. The railway filed numerous exceptions to the assessment, which were denied after a full hearing, and the railway prayed and was granted an appeal to the State Board of Equalization. The statute (Code 1533) provides that the Commission shall file with the Board the assessments made by them, together with such records as may be deemed necessary. Section 1534 provides that the Board shall proceed to examine the assessments so made, and are authorized to increase or diminish the valuation placed upon any property valued by the Commission, and are further authorized to request of the Commission additional evidence touching the property assessed; that if the Board so desire, they have the power, without referring any assessment to the Commission, themselves to employ experts, accountants, and to call witnesses to testify upon any assessment certified to them by the Commission, and to call upon the Interstate Commerce Commission for any valuation of property in the office of such Commission; that the assessments shall not be deemed complete until corrected and approved by the Board. Under Code section 1535, the Board is required to certify to the Commission the valuation fixed by them upon each property assessed, and the action of the Board "in fixing the valuation upon such property shall be conclusive and final and the valuation so fixed shall be assessed against said property and the taxes due thereunder be paid."

The Board reviewed the assessment of the railway's property and approved the same. Before the Board certified back to the Commission the amount of the assessment, as approved, the railway filed its petition for writs of certiorari and supersedeas in the Circuit Court of Davidson County. The circuit judge, upon motion of the Board, taking into consideration the entire record as certified to the circuit court

by the Board, dismissed the petition and discharged the supersedeas. From this action of the circuit judge, the railway has appealed to this court and made numerous assignments of error. The railway in the presentation of its case, has not followed seriatim the assignments of error. As a matter of convenience we will follow the same course.

The railway complains, in the argument contained in its brief, that "The assessment is not supported by any evidence; is grossly in excess of the value of the property as established by the evidence; was made by methods not calculated to produce a fair and just result and therefore arbitrary and illegal; and was made in violation of the provisions of the statutes controlling the assessment of railroad property."

The assessment made by the Board is made final and conclusive by statute (Code 1535) and is not open to review by the courts on certiorari, where the Board has not with reference to the assessment, exceeded its jurisdiction or acted illegally or fraudulently. Tomlinson *v.* Board of Equalization, 88 Tenn., 1, 12 S. W. 414, 6 L. R. A. 207; Anderson *v.* Memphis, 167 Tenn., 648; Treadwell Realty Co. *v.* City of Memphis, 173 Tenn., 168, 116 S. W. (2d) 997. In Savage *v.* City of Knoxville, 167 Tenn., 642, it was held that value placed on property for taxation by duly constituted taxing authorities is not reviewable by the court, nothing else appearing, since value is a matter of opinion. In Mossy Creek Bank *v.* Jefferson County, 153 Tenn., 332, 284 S. W. 64, it was held that mere error in honest judgment of a county board of equalization as to value of property will not obviate binding effect of conclusion, in absence of fraud. The rule announced by the above cases is no longer open to doubt or discussion. Where, however, the Board acts illegally, fraudulently or in excess of its jurisdiction, certiorari is the proper remedy. State *ex rel. v.* Dixie Portland Cement Co., 151 Tenn., 53, 58; Railroad *v.* Bate, 80 Tenn., 573.

The provision of the statute that the valuation made by the Board "shall be conclusive and final" presupposes a substantial compliance with the proceedings prescribed with reference to the method of making valuation of railroad property.

The Commission, as affirmatively appears from the itemized assessment made by them, considered all of the elements specified in the statutes (Code 1526). The Commission had before it the return of the railway and other evidence submitted and fixed the value of the railway's property in the sum above stated. No witness, or document in evidence, fixed the exact value as reported by the Commission; but from the facts developed, the Commission held itself able to fairly and equitably fix the actual cash value of the property. No intentional discrimination or fraud on the part of the Commission or Board is charged or proven. In Rowley *v.* Chicago & N. W. R. Co., 293 U. S. 102, 79 L. Ed. 222, the court said:

> "There is nothing in this record to suggest any lack of good faith on the part of the board. Overvaluation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity."

In Chicago Great Western R. Co., *v.* Kendall, 266 U. S. 94, 69 L. Ed. 183, 189, the court said:

> "It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. There must be clear and affirmative showing that the difference is an intention discrimination, and one adopted as a practice."

The rule announced in the above cases is generally recognized and needs no additional citation of authority in its support.

The good faith of the Commission and Board and the validity of their action are presumed; when assailed, the burden of proof is upon the complaining party. Sunday Lake Iron Co., *v.* Wakefield, 247 U. S. 350, 62 L. Ed. 1154.

It is contended for the railway that the Commission and Board should have made the assessment on the basis of

capitalization of net income at a rate which would measure a fair return to the investor in the property; or, at least, that such method should have been made the predominant factor in arriving at the value of the property. Capitalization of net income is not specified in section 1526 of the Code; but this factor could have been considered along with other elements in fixing the value of the property. Incorporated in the assessment made by the Commission under the caption "Earnings" is a tabulated statement of net operating income for the years 1933-1938. A statement filed by the railway showed net operating revenue for the years 1931-1937 averaged $947,530.60 per annum, and that the net revenue from non-operating property for the seven year period averaged $13,747.28, making a total average net operating revenue of $961,277.88. The insistence is that if this average net revenue be capitalized at 6%, a value of $16,021,298 is shown for the entire system as compared with the $23,996,604.14 fixed in the assessment. The statement of average income was considered by the Commission, as is shown by the following statement of one of the Commissioners made on the argument before them, "* * * to see what the trend was, whether the trend was upward or downward with the company, as justification for reducing or raising the assessment, so that was largely the purpose of having that in the brief, was what I thought." Greater weight was given to the most recent figures "to judge present day conditions."

We are unable to agree that the Commission, or the Board, was under any legal compulsion to make the assessment on the basis of capitalization of net income, or to make net income a predominant factor in arriving at the value of the property. A railroad is to be assessed according to its value as a railway, by taking into consideration the elements specified in Code, section 1526, which includes "other evidence taken to enable them to fairly and equitably fix the actual cash value of the properties." Counsel for the railway refers to Railroad *v.* State, 55 Tenn. 798, as approving decisions holding that "a tax can only be just and equal on railroad corporations by being assessed upon the profits." The court did not approve this as an exclusive method of ascertaining value; on the contrary, the court said, "we can

conceive of no better criterion by which its value can be ascertained, than, first, the value of the structure, superstructure and properties, and then the profits which may enure to its owners in its operation." The court further stated, "A tax on a corporation may be proportioned to the income-revenue, as well as to the franchise granted, or the property assessed," citing Minot, Jr., *v.* Railroad, 18 Wall. 206 (21 L. Ed. 888). Railroad *v.* State, *supra*, was decided prior to the enactment of the first railroad assessment law in 1875.

In Great Northern Ry. Co., *v.* Okanogan County, 223 Fed. 198, it is said:

> "The value of a completed railroad is not easy of ascertainment. Railroads are not usually bought and sold on the open market. Their value is in use, rather than in exchange, and many elements go to make up that value. The cost of construction or reproducing, the income, the earning capacity, the value of stock and bonds, have all been taken into consideration by the courts. None of these elements are controlling, however."

A like statement to the above is to be found in 26 R. C. L. 189.

It is complained by the railway that the apportionment of distributable property to Tennessee on mileage basis is invalid. The Commission found the railway's distributable property in Tennessee to be the average value per mile of the system distributable property multiplied by the number of miles of main track in Tennessee. On the basis of a total mileage in the system of 1,115.34 of which 800.02 miles is in Tennessee, and the total entire value of distributable property to be $18,022,133.14, the Commission assigned to Tennessee for taxation a value of $12,926,944. It is contended by the railway that this method of allocation is contrary to statute (Code 1526) and has the effect of importing into Tennessee for taxation values located in other states, contrary to Article 1, section 8, and Article 2, section 28, of the Constitution of Tennessee, and the due process clause of the Fourteenth Amendment to the Constitution of the United States. It is further contended that the value of the

entire property ($23,996,604.14) "is in substantial excess of any reasonable opinion or estimate of value supported by or deducible from any evidence upon which such assessment was made, and which finding of value is not supported by or based upon any evidence in the record upon which the assessment was made, all of the evidence showing that the actual value is not in excess of $16,021,298." This is a renewal of the contention that the value of the property should have been fixed on the basis of capitalization of net revenue of the system, and not upon the basis adopted by the Commission.

In Railroad *v.* State, *supra*, at page 797, the court said, "If it be an interstate railroad, as in this case—a part in this State and a part in another—we know of no better plan to fix the taxable value of that portion lying in this State, than to ascertain what proportion the latter bears to the whole. Upon this subject, however, there is great conflict of authority, and great contrariety of judicial reasoning and ruling."

In Franklin County *v.* Railroad, 80 Tenn. 521, 540, the court said:

> "No part of the mere roadway can be said to be more valuable than any other part, when considered as a track for the exercise of the franchises of the company as a common carrier. It is, like the franchise itself, a unit for the purposes intended, these purposes being not merely the use of the road for the profit of the company, but its use for the benefit of the public. Any interruption of that use is a public as well as a private calamity. 'It may well be doubted,' says the Supreme Court of the United States, 'whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.' State Railroad Tax Cases, 92 U. S. 608."

In Pittsburg, C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031, the court quoted with approval the above paragraph taken from Franklin County *v.* Railroad,

and held, that the value of one part of a single continuous line of railroad is fairly estimated by taking the part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road, unless accompanied with proof that portions of the road outside of the state were of largely greater value than any similar length of road within the state. In Cleveland, C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 439, 38 L. Ed. 1041, that in assessing a part of a railroad within a state, the other part of which is in an adjoining state, when the assessing board ascertains the value of the whole line as a single property, and then determines the value of that within the state, upon the mileage basis, that is not a valuation of property outside the state, if no special circumstances exist to distinguish the conditions in the two states, such as terminal facilities of enormous value in one and not in another.

The record in the instant case does not disclose that the portions of the railroad outside Tennessee are largely of greater value than the portion within the State, or that any special circumstances exist to show a greater value outside the State than within the State. The railway contends, however, that by breaking down the whole net revenue so as to show the portion thereof earned within the State as compared to that earned out of the State a greater value is shown to exist out of the State. The railroad was valued as a whole by the Commission. All of the elements set forth in Code, section 1526 were considered. Under the well established rule for assessment on a mileage basis, no exceptional facts appearing, the portion of the railroad in Tennessee could not be treated as an independent line, disconnected from the part without the State. Furthermore, the exception to the rule contemplates, we think, that it be clearly shown that the portion of the road out of the State has a greater value than the part within the State, such as terminal facilities or other improvements not found within the State.

Our conclusion on the question of allocation is that the assessment did not violate any of the railway's rights under the State Constitution, nor under the Fourteenth Amendment to the Federal Constitution.

Another complaint made by the Railway is that the Commission and Board assessed its property at actual value, while the property of all other taxpayers was assessed at two-thirds of its actual value. A large number of affidavits made by local assessors were filed with the Commission to the general effect that affiants intentionally and systematically assessed other property for taxation at an amount not exceeding 75% of its value. Affidavits from others to like effect were also filed.

County assessors are required by law to assess property at its actual cash value (Code 1349). And they take an oath of office that they will assess all property at its actual cash value (Code 1343). They must make oath to the assessment lists, which contains the statement that they have assessed all property at its actual cash value (Code 1375). The assessment lists are returned to the county court clerk.

The assessments as made by the county assessors are not final. On the contrary, the assessment lists are required to be delivered by the county court clerk to the county board of equalizers (Code 1424). Under Code 1426, the duties and powers of the board are defined. It is made their duty "to carefully examine, compare, and equalize the county assessments." It is further provided therein that, "said board shall have the power, and it is hereby made its duty, to increase or lower the entire assessment roll or any assessment contained therein, so as to equalize the assessment of all property contained therein, *and make such assessment conform to the actual cash value of the property described in the assessment.* If the property described in said assessment lists or any part thereof *shall have been assessed at less than the actual cash value thereof, the value of the same shall be increased so as to conform to the actual cash value thereof,* * * *." (Italics ours.) [By the Court.]

Under Code, 1434, the county board upon returning the assessment roll to the clerk are required to append to the same a verification, signed by each member, that they have equalized and fixed the value of all property at the actual cash value thereof.

Under Code 1440, it is made unlawful for board to equalize at less than actual cash value. It is made the duty of the county board of equalizers to transmit to the State Board of Equalization a summary of the assessment as completed by it.

The State Board of Equalization is directed to meet at places throughout the State, selected by them. (Code 1448.) And it is provided in section 1456 that the Board "*shall have jurisdiction of, and it shall be its duty, to equalize during its session the assessments of all property in the State*" and its action "*shall be final and conclusive as to all matters passed upon, * * * subject to judicial review.*" (Italics ours.) [*sic*]

If the county assessors and the few members of county boards of equalizers making affidavits on the hearing before the Commission assessed property at less than actual value, and did so intentionally and systematically, there is no showing whatever that the members of the State Board of Equalization violated their oath of office by underassessing property. In the absence of a contrary showing, it must be assumed that the State Board did their duty. There is neither allegation nor proof that the State Board intentionally and systematically refused to equalize assessments at actual value. The good faith of such officers and the validity of their actions are presumed. Sunday Lake Iron Co. *v.* Wakefield, 247 U. S. 350, 62 L. Ed. 1154. In order to support a claim of discrimination under the equal protection clause of the Fourteenth Amendment there must be something that amounts to an intention or the equivalent of fraudulent purpose to disregard the fundamental principle of uniformity.

Another complaint made by the railway is that the Commission and Board included in the assessment interest bearing securities and corporate stocks to the value of $2,484,000, not subject to taxation. The assessment shows on its face that the value of the railroad was fixed, "making due allowance for all non-taxable securities held." The securities were considered by the Commission merely as reflecting on the present financial condition of the railway but the value of the securities was not included in the assessment as is affirmatively shown in the assessment itself.

It is complained that the Commission included 3.65 miles of railroad, known as the "West Nashville Branch," as main track mileage in computing the value of the railway's distributable property. It is asserted that all of the evidence shows this line to be side tracks. The railway's own return shows this 3.65 miles to be main track.

From our examination of the record we are satisfied that the assessment made on the property of the railway was fair and equitable. There is nothing to support the contention that the assessment was discriminatory or arbitrary.

The record shows (ex. 19) that the property of the railway, in Tennessee, was valued for taxation in former and 1938-1939 years as follows:

"1923-1924	24,000,000
1925-1925	24,795,303
1927-1928	24,795,303
1929-1930	26,000,000
1931-	23,750,000
1932-1933	17,000,000
1934-1935	16,999,966
1936-1937	16,499,998
1938-1939	16,223,194"

The former valuations were not made the basis for the 1938-1939 assessment; but they may be looked to on the argument that the railway's property had declined in value.

The Board in its opinion stated, "It will be seen, that the assessment made for the year 1938-1939, is a substantial reduction from the high of 1929-1930, indeed, a reduction in the sum of $9,776,806.00. We are convinced that this reduction of companies assessment from the high point in recent years, is comparable with the reduction enjoyed by owners of other property, or any class of property, within the bounds of this State."

It is argued that property generally, throughout the state, is assessed for taxation at less than cash value; and that the court should take judicial knowledge of such underassessment. Whatever may have been the practice in this regard in former times, it is our belief that since 1930 as-

sessments generally are and have been higher than the actual cash value of the property assessed.

It is argued that the Commission "arbitrarily assessed the railway's distributable property at the valuation placed upon it for the preceding biennium, notwithstanding the abandonment of 38 miles of Tennessee main track which the Commission had in said previous assessment included at a valuation of $15,407.93 per mile, aggregating $587,500." The argument seems to be that the Commission and Board should have deducted from the assessment the sum of $587,500 representing the value alleged to have been placed on 38 miles of main track in the assessment of 1936-1937, and asserted to have been thereafter abandoned. The railway returned 800.2 miles of main track for the 1938-1939 assessment and that is the mileage assessed. The 38 miles was not included in the return or the assessment. In considering the various factors and elements going to make up the distributable value of the properties for 1938-1939, the Commission and Board found the total value thereof (excluding the 38 miles above mentioned) to be $12,926,944, which assessment it is asserted is the same as 1938-1939. The total assessment for 1938-1939 was $276,804 less than for the previous biennium. The valuation for assessment of the 800.2 miles of main track returned by the railway for assessment fixed by the Board, under the statute and authorities hereinbefore cited, cannot be reviewed by this court, the Board not having exceeded its jurisdiction or acted illegally.

The opinion of the Board contains the following:

"This appeal presents to the Board a difficult problem. Each member is ex officio. Therefore, adequate time is not ours to give the necessary investigation to entirely satisfy even ourselves, that we may reach an equitable conclusion. However the responsibility is ours and we would not shirk it."

It is contended that this statement shows that the Board made the assessment, or approved the assessment without making necessary investigation. The opinion specifically refers to the railway's exceptions and there is nothing to show that they were not given consideration. While not dealt

with seriatim in the opinion, the conclusion reached was that the assessment made should stand. Various additional affidavits, charts and maps were introduced by the railway before the Board and there is nothing to show that these were not considered by the Board. On the contrary the record shows that the exceptions were fully argued before the Board and the able counsel for the railway and the Board acquainted the Board with all the pertinent facts and with their respective contentions. The assessment as made by the Commission, together with the whole record as made up before it, was filed with the Board, as required by Code 1535. The Board "proceeded to examine the assessment so made," as required by Code 1534. It received additional evidence from the railway. It is mere empty assertion to say that the Board did not give proper or sufficient consideration to the cause. To upset the decision of this quasi court because of the expression set out above, which was immediately followed by the language, "However, the responsibility is ours and we would not shirk it," when there had been a full hearing on the exceptions, would be wholly unwarranted, especially when on a full hearing by the Board it was found that the exceptions were without merit, and subsequently so found, in effect, by the circuit judge.

After due consideration, we find all of the assignments of error to be without merit. The result is that the judgment of the trial court is affirmed. The railway will pay the costs of the appeal.

(S.) D. W. De Haven,
Judge.

Cook, Jr., and Kennerly, *Sp. J.*, concur.
McKinney, *J.*, and Chambliss, *J.*, dissent.

4. Dissenting Opinion of Mr. Justice McKinney.

From Record, pp. 135-138.

Davidson Law.

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY,
Plaintiff in Error,

v.

GORDON BROWNING *et al., Defendants in Error.*

DISSENTING OPINION.

I am of the opinion that the State Board of Equalization has not complied with the law, and for that reason the case should be remanded to that body in order that it may find the assessable value of the Railway property.

The State Board of Equalization, as I see the matter, has proceeded upon the theory that it is an appellate board to review and correct the errors committed by the Railroad and Public Utilities Commission when, according to my interpretation of the law, it is the final tribunal for fixing the value of the Railway property, and the report of the Commission is only advisory and informative. The Commission assesses the property and then certifies same to the State Board of Equalization for its final determination as to its cash value.

Under the law it is made the duty of the Railway to file a sworn schedule on the first day of April biennially, in the even years, giving the Commission the information set forth in section 1509 of the Code. Other pertinent statutes are as follows:

1526. "Upon examination of every such schedule and statement and other evidence taken by them, the said commission shall proceed to ascertain and determine the value of said property within the state for taxation and assess the same accordingly, taking into consideration the capital stock, corporate property, franchises, and gross receipts, the market value of the shares of stock and bonded indebtedness, and such other evidence as is afforded by said statements and schedules or other evidence taken to enable them

to fairly and equitably fix the actual cash value of the properties of such persons."

1533. "Said assessments shall be completed on or before the first Monday in August, and within ten days from the first Monday in August, the owner of any property assessed may appear and file exceptions to said assessment, together with such evidence as they may desire to submit as to the value of the property assessed, and at the expiration of said ten days, said commission shall reassemble and examine such additional evidence and exceptions as may have been filed, and act thereon, either changing or affirming their valuation. And on or before the first Monday in September, said commission shall file with the board of equalization the assessments made by them, together with such records as may be deemed necessary."

1534. "The state board of equalization shall proceed to examine said assessments so made by the commission, and they are authorized to increase or diminish the valuation placed upon any property valued by said commission, and are further authorized to require of said commission any additional evidence touching one or more of the properties assessed, and shall consider such additional evidence so furnished in fixing the correct value of any property so assessed, and said assessments shall not be deemed complete until corrected and approved by the said board of equalization; and the governor is authorized to call said commission at any time to perform the duties imposed upon them; provided, however, that if said board of equalization shall so desire, they shall have the power without referring any assessment to said commission, themselves to employ experts, accountants, and to call witness to testify upon any assessment certified to them by said railroad commission; and said board of equalization shall have the same powers to compel attendance of witnesses, production of books, papers, and documentary evidence as is by this statute given to said commission. Said board of equalization shall have the right to call upon the interstate commerce commission for any valuations of property in the office of the interstate commerce commission and evidence in possession of said commission in support of such valuations.

"All of the evidence thus acquired by said board of equalization shall be considered by them in addition to the evidence transmitted to said board by said commission in support of the assessment so fixed by said commission.

"Any expense incurred by said board in calling for the additional proof as to the value of any property certified to them by said commission shall be by said board of equalization certified to the state comptroller and paid by him out of any moneys in the treasury not otherwise appropriated."

1535. "On or before the third Monday in October, said board of equalization shall certify to the commission the valuation fixed by it upon each property assessed under this law, and the action of the board of equalization in fixing the valuation upon such property shall be conclusive and final and the valuation so fixed shall be assessed against said property and the taxes due thereunder be paid."

From the foregoing statutes it appears that the responsibility for finally fixing the value of the Railway property is vested in the State Board of Equalization, and it cannot discharge that duty by giving the report of the Commission a perfunctory and superficial examination and consideration.

The report of the State Board of Equalization begins with this statement:

"This appeal presents to the Board a difficult problem. Each member is *ex officio*. Therefore, adequate time is not ours to give the necessary investigation to entirely satisfy even ourselves, that we may reach an equitable conclusion."

As I construe the statutes, the assessment by the Commission does not become final until approved by the State Board of Equalization; that Board being vested with power to either increase or decrease the value placed upon the Railway property by the Commission even though there has been no appeal. The Board states very frankly that it did not have time to make the necessary investigation to enable it to reach an equitable conclusion. But the statute imposed such duty upon it, and until such investigation and consideration is made it has not complied with the law. In

this connection I wish to emphasize the fact that the statute authorizes the Board "to employ experts, accountants, and to call witnesses to testify upon any assessment certified to them by said railroad commission." They also have the right to call upon the Interstate Commerce Commission for any valuation made by it of the involved property. The State Board of Equalization is, therefore, vested with all necessary authority, and has the facilities at its disposal to enable it to arrive at an equitable and just valuation of the Railway property.

The State Board of Equalization, furthermore, seems to have been largely influenced by the 1936-1937 assessment of the Railway property, which, it states, the record shows was agreed to by the Railway. Such statement is not supported by the record; but if it was that would be no criterion of value, since the statute expressly provides the method by which such value is to be ascertained.

The Board in its report makes the following additional statement:

"It appears in the record, and it was stated in argument, that the Commission, in reaching its conclusion, looked to the capital stock, corporate property franchises and gross receipts, the market value of the shares of stock and bonded indebtedness, and all evidence as afforded by the returns, statements and schedules made by the company. We assume that their statements are true, and we understand that these elements must be used, as a matter of law, in making such assessments."

It is apparent from this statement that the Board did not consider these elements, as it was its duty to do, but proceeded upon the assumption that the Commission had considered same and had, therefore, arrived at a valuation in the manner provided in the statute.

Counsel for the State contend that there is no fixed, positive or definite formula for the valuation of such property. We are unable to accede to this position of counsel. The Board, necessarily, is to arrive at the valuation by the method set forth in the statute for the ascertainment of its value by the Commission. It was certainly never intended that the Commission should use one formula and the Board a different one.

This is a case of great importance both to the State and the Railway, and one that the Board should fully and carefully investigate and consider. Only three of the five members composing the Board participated in the hearing and consideration of this case. While the statute provides that three members of the Board shall constitute a quorum, I am of the opinion that as a matter of policy it would be better in a case of this magnitude and importance if it were heard, investigated and considered by the entire membership of the Board in order that as full and complete justice may be arrived at as is humanly possible.

McKinney, *J.*

5. Dissenting Opinion of Mr. Justice Chambliss.

From Record, pp. 138-143.

Davidson Law.

The Nashville, Chattanooga and St. Louis Railway, *Plaintiff in Error,*

v.

Gordon-Browning *et al., Defendants in Error.*

Dissenting Opinion.

I find myself in accord with the views expressed by Mr. Justice McKinney in his dissenting opinion. Whether because of "inadequate time * * * to give the necessary investigation," as expressed in the opinion handed down by the Board of Equalization, or because of an under estimate by the members of that Board of the extent and nature of the duties which I understand the law imposes upon them in the making of railroad assessments, as distinguished from assessments of real estate generally, I am satisfied that errors appear.

I fully appreciate that the Circuit Court and this Court are restricted to the correction of errors involving excess of jurisdiction, illegality or fraud, without power to substitute our opinion as to value for that of the assessing tribunal, but no such restriction applies to the Board of Equaliza-

tion. That Board sits as a quasi-Court with *de novo* jurisdiction, with the obligation to render judgments of appraisal of value for taxation upon an *independent* investigation and examination into all the evidence. It is this judgment, so arrived at and exercised independently, which is made "conclusive and final."

It seems to me quite obvious from the recitals of the brief opinion filed, that the judgment fixing the assessment in this case was not so arrived at, but was rested largely upon two matters referred to in the opinion, (1) statements, or conclusions, in the report of the Railroad Commission, which, says the opinion "we assume * * * are true" (that is, have adopted without independent examination and verification); and (2) the record of assessments of this Railroad for previous years, set out in the opinion.

I realize the difficulty of the task which I understand the law imposes on the Board of Equalization, composed, as it is, of gentlemen whose duties incident to their several highly important offices are so exacting as to leave them little time for the discharge of their extra "ex officio" duties as members of this Board. To meet this situation, however, the legislature has expressly provided that the Board may employ their own experts and accountants and bring in evidence from various sources of different kinds, including such as may be in possession of the Interstate Commerce Commission, all in order that the Board of Equalization may fit itself to make its own finding and appraisal of values on which to base its assessments. Now it does not appear that any such course was followed, but, as already suggested, the Board *assumed* the correctness of the conclusions reported by the Railroad Commission and adopted them in toto. However competent and capable the distinguished gentlemen composing the Railroad Commission are, the duty and responsibility is imposed, not upon them, but upon the Board of Equalization, of rendering a judgment, which shall be "final and conclusive", after making for itself the investigation necessary to enable it to fix for itself these values.

It was exceedingly important to the petitioner in this case that the broad *de novo* jurisdictional powers of the Board of Equalization should be fully and carefully exercised,—that

"adequate time" should be taken for "the necessary investigation" that the Board might "reach an equitable conclusion."

In addition to, and in line with the general criticism which I have felt constrained to make of the inadequacy of the examination apparently made by the Board of Equalization, in the exercise of its independent and final jurisdiction, an examination of the pertinent records convinces me that several specific errors appear going to the *legality* of the judgment of the Board of Equalization before us for review.

1. Reference has been made to the consideration given assessments of this Railway's properties for former years. One-third of the brief opinion of the Board is devoted to a comparative analysis of these former assessments which are quite apparently given predominant consideration. I find no authority for thus using assessments made in former years as a basis of value. The petition shows, and common knowledge of affairs supports, that radical and fundamental changes have taken place in the last few years in the conditions which basically affect the value of railroads, so that assessments of former years furnish today no fair controlling criteria for appraisal of this particular, and peculiar class of property. For example, what is known as the "franchise" of a railroad, formerly a highly important element of value, has today greatly less value. A franchise is a special privilege, originally granted to a subject by the Crown, now in this country by the Government. It implies profitable advantages not enjoyed generally, or competitively. A common incident of a franchise is a degree of monopoly. The grant to railroads carries the right of eminent domain, for instance. Inherent, therefore, in the franchise of a railroad, were former advantages which yielded automatically more or less large profits, not to be generally enjoyed. Now, this is changed, and it must be conceded—all men know it—that practically all of this element of value, formerly the dominant incident of the franchise, has been wiped out, in large measure by the policies and contributions to competition of the Government itself. This competition in transportation of passengers and freight, graphically set forth in the proof in the record, has apparently not only wiped out the major elements of value of

the franchise, but has diminished greatly the "use" value of the railroads as a whole, and calls for at present a thoroughgoing investigation of basic elements of value applicable to present day conditions, which it is apparent the Board of Equalization, for reasons indicated, did not undertake, or have opportunity, to make.

2. It is complained for petitioner that the Board of Equalization refused to regard the net earnings as an important element in fixing value. Attention is called to the argument before the Board of Equalization of Mr. Hendley, (expert and spokesman for the Railroad Commission) that "not once in the law do we find the word 'net' "; that "the elements principally are the 'gross' receipts, the value of the stock and bonds and the value of the corporate property"; and in commenting on the assessment made by the Railroad Commission, the opinion of the Board of Equalization says that it was the "gross receipts" which were considered. While it is true that in Code Section 1526 the expression "gross receipts" is used, we think it clear that the law as a whole contemplates that the operating expenses shall be considered in the same connection, thus arriving at the "net." The language of this section as a whole so requires, calling, as it does, for statements and schedules and other evidence as a basis for fixing the values. Also, Section 1509, setting out more specifically the information to be laid before and considered in making the assessment, expressly couples together the gross receipts and the expenses.

3. I think the record as a whole indicates that, contrary to the law applicable, certain intangibles of considerable amount, non-taxable under what is known as the Hall income tax law, have been taken into account in fixing the valuation arrived at as a whole. If this is so, then the assessment has to this extent, certainly, been illegally arrived at. The brief opinion is silent on this question, much stressed by petitioner, but it does appear that Mr. Hendley, the official spokesman for the Railroad Commission, in presenting the case to the Board of Equalization, did specifically call attention to the fact that the Railway held these valuable assets and this item was thus plainly brought to the attention of the Board in support of the assessment figures as reported by

the Railroad Commission. It seems to me that it may be fa assumed that these items were taken into account in fix the assessment. In arguing before the Board of Equal tion for its adoption of the assessment figures reported the Railroad Commission, Mr. Hendley, above mentio said, "The N. C. & St. L. Railway unlike other railro have a nice cash surplus on hand. Its financial set u good. On January 1st of this year they had on hand c and non-taxable Federal bonds and notes in the amount $3,569,801.00 to which should be added the $140,00 earned since January, 1938." The inference seems pl that these elements showing the Railway's "financial set is good" were considered in appraising the corporatio properties as a whole—otherwise why mention them? C menting on this matter, the majority opinion says, "T securities were considered by the Commission merely as flecting on the present financial condition of the Railwa Obviously, such consideration reflected an increased va and thus served to bolster up the assessment as a whol

4. Reference has been made to apparent reliance on sessments of former years. It is shown that 38.96 mile main track of petitioner's railroad, formerly assessed $590,292.95, had been abandoned, with the approval of Interstate Commerce Commission. This reduced the t track mileage in Tennessee from 838.98 to 800.02 miles, the value fixed for assessment here is identical with t made in the greater mileage for 1936, being, in both stances, $12,926,944.00. This seems to demonstrate that assessment for this previous year was not only consider but adopted.

5. The evidence appears to show that 3.65 miles of tr described as West Nashville Branch, is an industrial or s track and that this trackage has been included in the ass ment as returned as main track mileage.

Without further elaboration, I concur with Mr. Jus McKinney that justice demands that the case should be manded to the Board of Equalization for a re-determinat of the assessment.

CHAMBLISS, J.

6. Opinion on Petition to Rehear.

From Record, pp. 143-145.

Davidson Law.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
Plaintiff in Error,

v.

GORDON BROWNING *et al.* (State Board of Equalization),
Defendants in Error.

ON PETITION TO REHEAR.

This cause is again before the court on the railway's petition to rehear and the reply of the State Board of Equalization thereto. The court discussed in its opinion the questions made by the railway's assignments of error and decided the same. Most of the petition to rehear is devoted to a reargument of some of these questions. One new question is sought to be raised by the petition. It is asserted that the localized property of the railway was assessed at $3,297,250 by the Board "without knowing or inquiring how the aggregate is made up," and that the Commission withheld from the Board "all information of its valuation of localized property items." This attack on the assessment was not specifically made by any of the assignments of error filed in this court. Rule 14 of this court provides, among other things, as follows: (173 Tenn., 874.)

"Assignment of Error.—The assignment of errors shall contain in the order herein stated:

"(1) * * *.

"(2) A statement of the errors of fact or law relied upon to reverse or modify the same, showing *specifically* wherein the action complained of is erroneous, and how it prejudiced the rights of the appellant, or plaintiff in error, and reference to the pages of the record where the ruling of the court on matters constituting errors of law appears; and in case it is an error of fact, to the

pages of the record where the testimony is to be found relied upon to sustain the same." (Italics ours.)

The railway, as before stated, did not specifically assign as error the action of the Commission and Board in assessing its localized property at $3,297,250. The rule assumes *prima facie* the correctness of the proceedings of the inferior courts, and imposes on parties assailing them the duty of specifically pointing out the errors of which they complain. Denton *v.* Woods, 86 Tenn. 37; Wood *v.* Frazier, 86 Tenn. 500. A subject on which no assignment of error has been made need not be considered on appeal. Hawkins *v.* Hasbell, 127 Tenn. 312.

The exceptions filed before the Commission did not specifically complain of the assessment on the localized property. The petition for certiorari alleged that it prayed an appeal to the Board "to the end that said exceptions might be there further considered," and it was further averred that if was notified "that its exceptions as filed with the Railroad and Public Utilities Commission would be considered by the State Board of Equalization on November 2, 1938, and said hearing was accordingly held upon the evidence and record transmitted to the Board by the Railroad and Public Utilities Commission." The railway in its petition for certiorari to the circuit court exhibited therewith its exceptions. It was not alleged in the petition for certiorari that the assessment made on the localized property was illegal or void. No such issue was specifically tendered by the petition.

This court did not hold that the examination by the Board of the assessment made by the Commission was dependent upon the railway's appeal or limited or restricted thereby. On page 2 of the opinion the substance of Code 1534 defining the duties of the Board with reference to the assessment returned by the Commission is set out. But, as shown by the record, the railway in its petition for certiorari to the circuit court did not specifically allege that the assessment of its localized property made by the Commission and approved by the Board was invalid for any reason.

The railway's motion for a new trial, filed in the circuit court, does not contain in any of the grounds therefor an

specific complaint that the trial judge held the assessment of localized property valid, or that he refused to pass upon such question.

Rule 14 (5) of this court provides that the grounds upon which a new trial is sought in this court "will not constitute a ground for reversal, and a new trial, unless it affirmatively appear that the same was specifically stated in the motion made for a new trial in the lower court, and decided adversely to the plaintiff in error, but will be treated as waived, in all cases in which motions for a new trial are permitted." The following is recited in the rule:

> "This is a court of appeals and errors, and its jurisdiction can only be exercised upon questions and issues tried and adjudged by inferior courts, the burden being upon the appellant, or plaintiff in error, to show the adjudication, and the error therein, of which he complains. RR. Co. *v.* Johnson, 114 Tenn., 640; Wood *v.* Frazier, 86 Tenn., 501; Jacks *v.* Williams-Robinson Lumber Co., 125 Tenn., 123; Hobbs *v.* The State, 121 Tenn., 413; Tennessee Central R. R. Co. *v.* Brown, 125 Tenn., 351."

For the reasons stated above, the railway cannot be heard to complain in this court of the amount of the assessment made on its localized property.

The petition to rehear contains some erroneous inferences and deductions from matters decided by the opinion of the court. We are responsible alone for the opinion and not for the construction, inferences or deductions that counsel may place thereon.

The Board had jurisdiction. It did not act illegally. The railway makes no claim of fraud as against the Commission or the Board. The valuation placed on the properties of the railway for taxation by the Board cannot be reviewed by the courts, in the absence of fraud. See authorities cited in opinion.

Our conclusion is that the petition to rehear is without merit and must be overruled.

(S.) D. W. DeHaven,
Judge.